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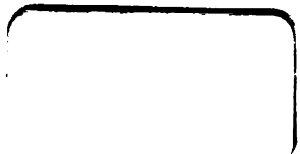
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 95

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced thereon, the order must be made has been allotted to one of the departments, and a judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any

four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1889, page 12.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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OF THE
STATE OF CALIFORNIA.

[No. 14658. Department Two. — June 15, 1892.]

CONSOLIDATED NATIONAL BANK, APPELLANT, v.
PACIFIC COAST STEAMSHIP COMPANY, RE-
SPONDENT.

AGENCY — AUTHORITY TO BORROW MONEY — INFERENCE FROM EMPLOYMENT.

— If the transaction of business carried on by an agent for his principal absolutely requires the exercise by the agent of the power to borrow money in order to carry it on, such power is impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment.

10. — NECESSITY OF BORROWING MONEY — PRESUMPTION — USUAL COURSE OF BUSINESS — EXPRESS AUTHORITY. — Where the authority of an agent to borrow money is denied by the principal, and it is proved that there was no necessity for borrowing money to effect any purpose of the agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority.

11. — OSTENSIBLE AUTHORITY — LOCAL AGENT OF STEAMSHIP COMPANY — OVERDRAFT. — There is no ostensible authority to a local agent of a steamship company to borrow money or over-draw from a bank, where it appears that its general agents had no notice that the local agent had an account with the bank, or had ever overdrawn the account or borrowed money from the bank, and that they had furnished the local agent with a safe in which to keep the money collected by him, and where it further appears that the bank did not notify the general agents of the over-draft, but dealt with the local agent only, and accepted his individual promises to pay the over-drafts.

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- 10. — PLEADING — TWO COUNTS UPON SAME CAUSE OF ACTION — DEMURRER TO FIRST COUNT — ERROR WITHOUT PREJUDICE.** — The sustaining of a special demurrer for uncertainty to the first count of a complaint, consisting of a common count for money had and received, the other count, upon which the case was in fact tried, consisting of a claim for over-drafts of defendant's accounts with the plaintiff bank, if erroneous, cannot be prejudicial error, where it appears from the evidence that there could be no recovery upon the first count, and that both counts were intended to represent the same cause of action.
- 11. — EVIDENCE — DEFALCATIONS OF AGENT — OVER-DRAFTS TO PAY DEFALCATIONS.** — In an action by a bank against a steamship company to recover a sum of money alleged to have been overdrawn from the bank by the company, evidence upon the part of the defendant tending to prove the amount of the defalcations of a local agent of the company, who had overdrawn his accounts with the bank, that his over-drafts were made to pay the amount he was behind in his accounts with the defendant, and that at the time of the over-drafts he had money of the defendant's on hand sufficient to pay all claims against the defendant, is admissible, as tending to prove that the over-drafts were not loans to the defendant, and that the agent had neither express nor implied authority from the defendant to make them; but that they were made by the agent for the purpose of paying his own debt to the defendant.
- 12. — ERROR WITHOUT PREJUDICE — EXAMINATION OF WITNESS — ANSWERS TO QUESTIONS OBJECTED TO.** — The sustaining of an objection to questions asked of a witness cannot be prejudicial error, where the witness is afterwards permitted to answer and does fully answer the questions.
- 13. — RE-OPENING CASE FOR FURTHER EVIDENCE — DISCRETION.** — The action of the trial court in refusing to reopen an action after the close of the trial, for the purpose of allowing the introduction of additional evidence, is not an abuse of discretion, where there is no showing of any excuse for not having produced the evidence at the trial.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion.

Works, Gibson & Titus, and *Works & Works*, for Appellant.

Simpson, being authorized to do and transact all of the business of the defendant at the port and city of San Diego, was a general agent, and, as such, authorized to do everything necessary or proper or usual in the conduct of such business. (Civ. Code, secs. 2297, 2319; *Hoskins v. Swain*, 61 Cal. 338; *Anderson v. Ames*, 151 Mass. 11; *Shepherd v. Milwaukee Gas-Light Co.*, 11 Wis.

243; *German Fire Ins Co. v. Grunert*, 112 Ill. 68; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; Mechem on Agency, secs. 285, 311.) Having authority, generally, and without limitation, to collect, pay out, and handle the money of the defendant at this port, he was authorized to open an account with the plaintiff, deposit money thereunder, and check against the same. (*Com. Bank of Lake Erie v. Norton*, 1 Hill, 501; *Hearne v. Keene*, 5 Bosw. 579, 584.) Having power to draw checks for and on account of the defendant, the authority to check beyond the amount on deposit, and thereby create an over-draft binding on the defendant, necessarily followed. (*Tradesmen's Bank v. Astor*, 11 Wend. 87; *Merchants' Bank v. State Bank*, 10 Wall. 604.) If the authority to deposit and draw checks, and, as consequent thereto, to overdraw the defendant's account, did not follow, as a matter of law, from the nature and character of his agency, his long and continued exercise of such power was, as to the plaintiff, with whom he dealt, equivalent to an express grant of such authority by the defendant. (*Merchants' Bank v. State Bank*, 10 Wall. 604.) If he was not expressly, or by the nature of his agency, authorized to deposit in bank, and draw against and overdraw the account, he was, as between the plaintiff and defendant, vested with that authority, for the reason that the defendant made him its ostensible agent for these purposes, by "intentionally, or by want of ordinary care," causing the plaintiff to believe he was its agent with such authority. (Civ. Code, secs. 2300, 2317; *Quinn v. Dresbach*, 75 Cal. 159; Mechem on Agency, sec. 282; *Heald v. Hendy*, 89 Cal. 632.) So the manner in which he was treated and allowed to deal with the plaintiff, as having apparent authority to act for it in the premises, was sufficient to bind the defendant. (1 Am. & Eng. Ency. of Law, 340; *Law v. Stokes*, 23 N. J. L. 249; 90 Am. Dec. 655; Mechem on Agency, sec. 282.) These rules of law are applicable to corporations. Where a corporation has allowed its officer or agent to conduct its business in a certain way, and to perform certain acts

for and on behalf of such corporation, the ordinary usage and practice of the corporation in this respect must, in the absence of counter-proof, be supposed to result from the regulations prescribed by the board of directors, to whom its charter and by-laws submit the general management of its business. (*Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 69; *Merchants' Bank v. State Bank*, 10 Wall. 604, 644.) It was the duty of the defendant to use ordinary care to ascertain and know what acts were being done and authority exercised by its agent. It was bound, as between itself and the bank, to inspect and examine the books of its agent, to ascertain the truth. If it did not, it, and not the bank, must suffer the loss. (*Leather Mfrs'. Bank v. Morgan*, 117 U. S. 97, 106; *Dana v. National Bank*, 132 Mass. 156.) The plaintiff bank was not bound to inquire for what purpose checks were drawn upon it. Nor is it material, so far as the bank is concerned, whether Simpson was behind with his accounts, and drawing the checks in favor of the general agent in order to make his accounts balance as between himself and his principal, or not. It was enough that he had authority to draw the checks. (*Bremer County Bank v. Mores*, 73 Iowa, 289; *Eyrich v. Capital State Bank*, 67 Miss. 60; *Hale v. Richards*, 80 Iowa, 164.) The apparent authority of Simpson, and the manner in which he was publicly treated by the defendant, could not be controlled by private instructions or limitations of authority not brought to the attention of the plaintiff. (*Lister v. Allen*, 31 Md. 543; 100 Am. Dec. 78; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Mecham on Agency*, sec. 283; *Owen v. Crawley*, 36 N. Y. 600, 604.) If an agent has authority to draw checks, he may overdraw even beyond an amount expressly limited by the principal with the bank. (1 *Morse on Banks and Banking*, sec. 358; *Bremer Co. Bank v. Mores*, 73 Iowa, 289.) The money overdrawn by Simpson having been paid directly to the defendant through its general agents, by the drafts of the defendant, it cannot be heard to deny his authority to draw and pay it over. It is not a question

as to which of two innocent parties shall suffer, as it would have been had the money thus overdrawn gone to some one else. As the defendant received the money, it is in no worse condition, if required to repay it, than if it never had been drawn. (*Mahoney Mining Co. v. Anglo-California Bank*, 104 U. S. 192; *Milligan v. Davis*, 49 Iowa, 126; *Marine Bank v. Butler Colliery Co.*, 5 N. Y. Sup. Ct. 291; *Fouch v. Wilson*, 59 Ind. 93; *Batch v. Taylor*, 10 N. H. 538; *Merchants' Bank v. State Bank*, 10 Wall. 644; *Rowan v. Buttman*, 1 Daly, 412; *Hearne v. Keene*, 5 Bosw. 579, 585.) The court below erred in sustaining the defendant's demurrer to the first count of the complaint. This count is in the usual form of common counts for money had and received, and has been held to be good in this state. (*Freeborn v. Glazer*, 10 Cal. 337; *Hunt v. City of San Francisco*, 11 Cal. 250, 258; *Buckingham v. Waters*, 14 Cal. 147; *Higgins v. Wortell*, 18 Cal. 331; *Wilkins v. Stidger*, 22 Cal. 235; 83 Am. Dec. 64; *Pavisich v. Bean*, 48 Cal. 364; *Magee v. Kast*, 49 Cal. 141; *Quimby v. Lyon*, 63 Cal. 394; *Clay v. Carroll*, 67 Cal. 19; *Castagnino v. Balletta*, 82 Cal. 250, 257.) It will no doubt be contended that it is apparent that the cause of action alleged in this and the other count of the complaint were identical, and that therefore the ruling, although erroneous, was harmless. But this position cannot be maintained. In the first place, this court cannot assume that the causes of action are the same, and in fact they are not. The second count depends upon the proof of the agency of Simpson, and his authority to make the over-draft. The first count called for no such proof. If the steamship company received the moneys of the bank and used it, it became liable for money had and received, whether Simpson had any authority to act for it or not. (*Merchants' Bank v. State Bank*, 10 Wall. 604, 644.)

Luce & McDonald, for Respondent.

One who deals with a special or local agent is bound to ascertain the scope and measure of his authority.

(Wade on Notice, 2d ed., sec. 660; Mecham on Agency, secs. 288, 289; Morawetz on Private Corporations, sec. 606; *Hurley v. Watson*, 68 Mich. 531; *Hayes v. Campbell*, 63 Cal. 143; *Chaffee v. Stubbs*, 37 La. Ann. 656.) Conceding that Simpson was "a general agent" in and about the business of the defendant at the port of San Diego, still he had no implied power to borrow money for the defendant, or to issue negotiable paper for its benefit. (Mecham on Agency, sec. 398; *Iron Mine v. National Bank*, 39 Mich. 644; *Mining Co. v. National Bank*, 1 Col. 531; 2 Col. 565; *Breed v. National Bank*, 4 Col. 481; *Carpenter v. Biggs*, 46 Cal. 92.) If the agent of a corporation has no authority to perform an act, except under extraordinary circumstances, the company is not bound by such act, unless the extraordinary circumstances actually existed at the time of the act in question; and one seeking to hold the company liable for such act must show the existence of the special circumstances upon which the authority of the agent to bind the company rested. (Morawetz on Private Corporations, sec. 606, and cases cited; *Harris v. Flume Co.*, 87 Cal. 526.) And an agent, unless specially authorized, never has the power to borrow money in order to carry on the business of the principal, unless such act is practically indispensable to the execution of the duties actually delegated to such agent; and it is not sufficient that the act proposed was convenient and advantageous both to principal and agent, or more effectual in the transaction of the business provided for. (Mecham on Agency, sec. 399; *Bickford v. Menier*, 107 N. Y. 490.) In the case at bar the account in question was not kept at the plaintiff bank in the name of the defendant, and the checks drawn against it, including the over-drafts, were not drawn in its name, and did not purport to be its act or by its authority. The addition of the word "agent" after Mr. Simpson's name, in the account, and to the checks, was a mere *descriptio personæ*, and created no liability against the defendant. (*Tannant v. National Bank*, 1 Col. 278; 9 Am. Rep. 156, *Hobson v. Hassett*, 76 Cal. 203; 9 Am.

St. Rep. 193.) All the authorities which hold that a special agent can, under any circumstances, bind his principal for moneys borrowed by him for it put it upon the ground that the act must be practically indispensable to the execution of the duties actually delegated; and that one seeking to hold the principal for such act must prove the existence of the special circumstances upon which the authority of the agent to bind his principal rested. (Morawetz on Private Corporations, sec. 606; Mecham on Agency, sec. 399; Wharton on Agency, sec. 137; *Bickford v. Menier*, 107 N. Y. 490; *Hurley v. Watson*, 68 Mich. 531; Civ. Code, sec. 2319, 2334.) Where the party relies upon the ostensible authority of an agent to sustain an unauthorized act, he must give evidence of similar transactions in which such acts of the agent were authorized or ratified. (*Robinson v. Nevada Bank*, 81 Cal. 106.) The failure of the plaintiff to make any inquiries of the defendant as to the extent of Simpson's authority, and its allowance of the continual overdrawing of the account, and its consent that such over-drafts should be continued by his son during Simpson's absence in England, constituted negligence of the grossest character on the part of the plaintiff, and bars all claim made by it of negligence against the defendant. (Wharton on Agency, sec. 137; Mecham on Agency, sec. 290.) As the record shows that the defendant received the money overdrawn, as payments by Simpson on account of its funds, and that he was still indebted to the defendant after its receipt of the last draft issued by the plaintiff for the last over-draft made by Simpson, and also shows that when the defendant received the proceeds of such over-drafts it was entirely ignorant that Simpson had so procured them; or that he had at any time deposited any of its funds in the plaintiff bank, since it had furnished him the safe for the safe-keeping thereof, the receipt and retention of such moneys by the defendant created no liability to the plaintiff for the same. (*Navigation Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 543; *Bohart v. Oberne*, 36 Kan. 284; *Thatcher v. Pray*,

113 Mass. 291; 18 Am. Rep. 480; *Robinson v. Nevada Bank*, 81 Cal. 106-110.) There was no error in allowing the defendant to prove the authority, powers, and duties of Simpson as its agent at San Diego, for the plaintiff was bound thereby, unless it could not, by the use of reasonable diligence, have ascertained them. (Wharton on Agency, sec. 137; Mecham on Agency, sec. 289, 290; Civ. Code, secs. 2319, 2334.)

VANOLIEF, C. — The complaint in this action, showing that plaintiff and defendant are corporations, is in two counts; the first alleging "that defendant is indebted to the plaintiff for moneys had and received by it from the plaintiff in the sum of \$13,574.47, which sum is now due and unpaid." In the second count it is alleged, substantially, that for many successive years the defendant did business with the plaintiff by depositing in plaintiff's bank, at the city of San Diego, and drawing therefrom on its checks large sums of money; during which time the defendant frequently overdrew its account in large sums, which were repaid at various times, except as hereinafter alleged. "That between April 18, 1889, and November 1st of same year, the defendant, by its checks, regularly drawn on the plaintiff, overdrew its account in plaintiff's said bank, in the sum of \$10,754.91," which, with interest at twelve per cent per annum, amounts to \$13,574.47. For this amount plaintiff prays judgment. A special demurrer to the first count, on the ground of uncertainty, was sustained by the court.

The answer of the defendant specifically denies each allegation of the second count, except that each party is a corporation.

The case was tried without a jury, and the court found for defendant on all the issues, and rendered its judgment accordingly.

Plaintiff's motion for a new trial, made on a bill of exceptions, having been denied, the plaintiff appeals

both from the judgment and from the order denying a new trial.

1. Appellant contends that the evidence is insufficient to justify the findings of the court in any material particular.

It appears that during the transactions in controversy the defendant was engaged in the business of marine carrier of freight and persons along the Pacific coast from Mexico to Alaska. Goodall, Perkins & Co., at San Francisco, were its general agents; but it had a local agent at each port on the coast where it did business. These local agents were under the control of the general agency, and were required to report directly to Goodall, Perkins & Co., at San Francisco. During the transaction in question, J. H. Simpson was the local agent for the defendant at the port of San Diego, in this state, and the plaintiff was there engaged in the business of banking. Continually since the organization of the plaintiff's bank, in 1883, until October, 1889, Simpson had an account of his deposits and drafts of money with plaintiff's bank, kept in the name of "J. H. Simpson, agent." To this account he deposited in the bank, from time to time during each month, considerable sums of money collected by him for the defendant. During the same period he was treasurer of a Masonic lodge, and also of an Unitarian church, and from time to time deposited to the same account considerable sums of money belonging to the lodge and to the church, amounting to over twenty thousand dollars, besides twenty-three thousand dollars of his own money. All his checks upon this account were signed "J. H. Simpson, Agent," and the greater portion of them made payable to himself, and actually paid to him. Of those paid to himself the greater portion were paid by drafts of the plaintiff on San Francisco, payable to Goodall, Perkins & Co. There was nothing on the checks, save the name of the payee, to indicate the purpose for which they were drawn. Neither the checks nor the account indicated for whom Simpson was agent.

On or about October 1, 1889, Simpson was discovered to be some nine thousand dollars short in his accounts with defendant, which he professed to be unable to pay, and for that reason was removed from his position as agent of defendant. At the same time his account with the plaintiff was overdrawn \$11,404.32, which, with interest at twelve per cent per annum, constitutes the amount sued for in this action.

If Simpson had actual or ostensible authority to borrow money for the defendant, the plaintiff is entitled to recover, otherwise not. This is the ultimate and pivotal question of fact presented for decision. Upon this question the trial court found for the defendant, and I think the finding is justified by the evidence.

The evidence is positive that no express authority to borrow money on defendant's account, nor even to deposit defendant's money in any bank, was ever given to Simpson; and there is no pretense to the contrary. But counsel for appellant contend, in substance, that such authority was implied from the necessity of borrowing money in order to carry on the business which Simpson was employed and authorized to do. The evidence, however, strongly tends to prove that no such necessity ever existed. It appears that Simpson occupied the position of agent for defendant at the port of San Diego since 1875, and that from some time in 1876 until the organization of the plaintiff bank in 1883, he had an account with the Commercial Bank of San Diego, similar to that which he afterwards had with the plaintiff; and that upon the organization of the plaintiff bank, as the successor of the Commercial Bank, his account with the latter was transferred to the former. His account in the Commercial Bank was often overdrawn to the extent of two hundred to three thousand dollars. Between the second day of January and the thirty-first day of December, 1888, he overdraw his account in the plaintiff bank thirty-seven times, in sums ranging from one thousand to four thousand six hundred dollars; but these overdrafts were frequently canceled by deposits. On De-

ember 31, 1888, the account stood credited with a balance of \$1,560.40 in Simpson's favor; and there was a still larger balance in his favor on the thirteenth day of February, 1889, when he drew a check in favor of himself for \$15,026.92; and the next day (February 14th) drew another for \$5,000. These two checks were paid to him in drafts on San Francisco, payable to Goodall, Perkins & Co., which were paid accordingly. On February 14, 1889, the over-draft was \$8,930; March 13th, \$13,782; April 19th, \$12,567; May 17th, \$13,741; June 19th, \$14,099; July 16th, \$14,111; August 21st, \$13,692; September 12th, \$15,717; October 3d, \$13,398; and October 11th, when the amount was closed, \$11,404.32.

It was proved that all over-drafts from December 31, 1888, until the account was closed, were paid to Simpson in drafts on San Francisco, payable and actually paid to Goodall, Perkins & Co., as the general agents of the defendant. It seems incredible that the agents of plaintiff could have believed that any of these over-drafts were necessary to enable Simpson to carry on any business which he was authorized to do as local agent of the defendant at the port of San Diego, or that Simpson intended to use or could have used them for any such purpose. Nor, indeed, is there any evidence that they ever pretended so to believe. Yet the over-draft sued for must be included in those drawn since February 12, 1889.

Mr. Simpson, who appeared as a witness on the part of the plaintiff, testified that there never was any necessity for his borrowing money to carry on any business which he was authorized to do for the defendant; that enough money was always collected by him to pay the running expenses of all the business he was authorized to do; that all his over-drafts, which were paid to him by plaintiff in drafts on San Francisco, payable to Goodall, Perkins & Co., were made for the sole purpose of reducing the balance against him in his accounts with the defendant, kept by Goodall, Perkins & Co., and that

he so informed Mr. Bryant Howard, the president of the plaintiff bank, before the 13th of February, 1889.

Mr. George C. Perkins, of the firm of Goodall, Perkins & Co., testified on behalf of the defendant that there never was any necessity for Simpson to borrow money for defendant for any purpose whatever.

As to the implied power of an agent to borrow money on account of his principal, the court of appeals, in *Bickford v. Menier*, 107 N. Y. 490, said: "If the transaction of the business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment." (See also *Hurley v. Watson*, 68 Mich. 531; *Mecham on Agency*, sec. 399; *Wharton on Agency*, sec. 137; *Morawetz on Private Corporations*, sec. 606.) Section 2319 of the Civil Code provides that an agent has authority "to do everything necessary or proper *and* usual, in the ordinary course of business, for effecting the purpose of his agency." It having been proved, as above shown, that there never was any necessity for borrowing money to effect any purpose of Simpson's agency, it will not be presumed, without evidence, that it was proper *or* usual, in the ordinary course of the business in which he was employed, to borrow money without express authority, when there was no necessity for so doing.

2. There is no evidence of ostensible authority. Simpson testified that he never notified the defendant or its general agents that he had overdrawn his account with plaintiff's bank, and that there was nothing in his correspondence with the defendant or its agents, or in the books which he kept for defendant, from which any such over-draft might have been inferred; and further-

more, that he had never informed defendant that he had an account with plaintiff or any other bank, and did not believe that defendant had notice of any such account before October, 1889. The only circumstance which it is claimed should have operated as notice of such account to Goodall, Perkins & Co. is, that seven or eight years before the trial they sent an expert accountant to examine the books kept by Simpson; and on that occasion, in order to balance his account, Simpson exhibited his pass-book as a voucher for a small balance in his favor, in either the plaintiff's bank or the Commercial Bank. The pass-book then exhibited showed the account to be in the name of "J. H. Simpson, Agent."

Mr. Perkins testified that Goodall, Perkins & Co. never had notice that Simpson had any account with any bank; that in 1884 they furnished him a good safe, supposed to be burglar-proof, in which to keep the money of the defendant; and they always supposed that Simpson purchased the drafts remitted to them with defendant's money, until after they discovered that he was short in his accounts with them, and after his last over-draft upon plaintiff. There was no evidence that defendant ever paid or recognized any debt for borrowed money contracted by Simpson, or by any other local agent. Moreover, the circumstantial evidence had a tendency to prove that the agents of the plaintiff never regarded the account of "J. H. Simpson, Agent," as the account of the defendant, and never understood that defendant was responsible for Simpson's over-drafts. 1. Although often anxious to have the larger over-drafts reduced, and requesting Simpson to reduce them, they never notified the defendant of the existence of the account, or of any over-draft, until more than fifteen months after Simpson was removed. 2. On June 20, 1888, the plaintiff took Simpson's individual note, signed "J. H. Simpson," for seven thousand dollars, to cover his over-drafts on the account of "J. H. Simpson, Agent." This note was afterwards, in July, 1888, paid by three memorandum checks drawn by the cashier on the account of "J. H.

Simpson, Agent." 3. About the 1st of April, 1889, Mr. Howard, president of the bank, complained to Mr. Simpson of the amount of the over-draft, and requested that it be reduced. Simpson then told Mr. Howard that he (Simpson) was about to go to England, where he expected to get about twenty-one thousand dollars, and on his return, in about three months, he would pay the over-draft. Howard asked him if he felt sure of that, and Simpson answered that he did. It was then agreed between them that an over-draft not exceeding twelve thousand dollars would be allowed during Simpson's absence, and that Simpson's son, who was to act for his father during his absence, should be allowed to over-draw the account to that limit. Thereupon Simpson gave the bank written authority to allow his son to draw checks and transact all banking business for him until further orders, and Simpson left for England on April 8, 1889. I think it does not appear when he returned, but it does appear that he failed to raise any money. On May 17th, 1889, the over-draft was \$13,741; June 19th, \$14,099; and September 12th, \$15,717; yet during that time no notice of the over-draft was given to the general agents of the defendant. In October, 1889, Simpson was removed on account of the deficit in his accounts with the defendant. Of this the plaintiff had notice, and soon thereafter Mr. Howard, the president of the bank, went to San Francisco and called on Goodall, Perkins & Co., and earnestly requested them to retain Mr. Simpson in their employ at San Diego, in the same position he had before occupied, and offered to go on his bond for the faithful performance of his duties; yet did not then, nor until about fifteen months thereafter, notify Goodall, Perkins & Co. of Simpson's over-draft in plaintiff's bank, nor of any demand against the defendant.

Mr. Howard's attempted explanation of these circumstances seems unreasonable and wholly unsatisfactory.

Section 2317 of the Civil Code defines ostensible authority to be "such as a principal intentionally, or by

want of ordinary care, causes or allows a third person to believe the agent to possess."

If there was any evidence tending to prove this, I think it safe to say the preponderance of the evidence was against it, and fully justifies the finding of no ostensible authority. (*Robinson v. Nevada Bank*, 81 Cal. 107).

3. It is contended that the sustaining of the special demurrer to the first count of the complaint was error prejudicial to defendant. Conceding that it was error, I think it appears that plaintiff was not injured thereby; for although it may be true, as stated by counsel, that a state of facts may possibly have existed entitling plaintiff to recover under that count without proving the authority of the agent, Simpson, to borrow money for defendant, yet it is quite apparent from the evidence that no such state of facts did exist, and that the first and second counts were intended to represent the same cause of action.

4. The court sustained an objection to each of the following questions propounded by plaintiff's counsel to plaintiff's witness, Simpson: "1. When did you first commence to deposit moneys for defendant in the Consolidated National Bank? 2. State on whose account and for whom these deposits were made by you as agent." But the witness was afterwards permitted to answer and did fully answer these questions.

5. There was no error in allowing defendant to prove the amount of Simpson's defalcations, that his over-drafts were made to pay the amount he was behind in his accounts with defendant, and that at the time of the over-drafts, he had money of the defendant's on hand sufficient to pay all claims against the defendant. Obviously, this testimony tended to prove that the over-drafts were not loans to defendant, and that Simpson had neither express nor implied authority from defendant to make them; but that they were made by Simpson for the purpose of paying his own debt to defendant. For these purposes the evidence was competent, even

conceding that it did not touch the question as to the ostensible authority of Simpson.

6. The trial, so far as the evidence was concerned, was closed on July 3d, when, by consent of both parties, the summing up by counsel was postponed until July 7th. On July 7th, the court being otherwise engaged, it was again postponed until July 8th. On July 8th it was again postponed until July 9th, by request of plaintiff's counsel. On July 9th plaintiff's counsel, without previous notice, moved the court to open up the case for the purpose of allowing the plaintiff to make proof that Simpson, in the transaction of defendant's business, had signed receipts, advertised in the papers, and signed other papers and documents, "J. H. Simpson, Agent"; and also that since the alleged over-drafts the defendant has taken conveyances of property from Simpson to secure defendant against loss. This motion was opposed, on the grounds that the proposed evidence was irrelevant and immaterial; and that there was no showing or suggestion of surprise, oversight, or inability to have procured the proposed evidence upon the trial. The court denied the motion. Counsel for appellant contend that this action of the court was an abuse of its discretionary power, but in this I think they are mistaken.

Neither the forms nor substance of the alleged receipts, advertisements, or other documents signed by Simpson as "agent," were shown. It may, therefore, be presumed that, unlike his account with and checks upon the plaintiff's bank, they contained the name of the principal,—the Pacific Coast Steamship Company,—and expressly showed the receipted demands to be claims against the principal, the advertisements to be the advertisements of the business of the principal, and that the other documents expressly purported to bind the principal. Such evidence would have added nothing favorable to plaintiff's case. Neither would the fact that defendant took security from Simpson, unless the security was given to indemnify defendant for loss on account of the demand of the plaintiff in suit, which is not pretended.

Besides, there was no showing of any excuse for not having produced the evidence at the trial.

I think the judgment and order should be affirmed.

TEMPLE, C., and BELOHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 14707. Department One. — June 16, 1892.]

IN THE MATTER OF THE ESTATE OF CHARLES McDEVITT, DECEASED.

CONTEST OF WILL — UNDUE INFLUENCE — PLEADING — ACTS PRIOR TO WILL — IMPORTUNITIES OF RESIDUARY LEGATEE. — A contest of a will on the ground of undue influence, which alleges acts of undue influence, and importunity continued for a long time prior to the making of the will, sufficiently connects the alleged undue influence with the testamentary act, by alleging that at the date of the will, and while in an enfeebled condition of mind and body, and unable to resist the importunities of one of the residuary legatees, deceased made his mark to said pretended will.

10. — VERDICT OF UNDUE INFLUENCE — NEW TRIAL — EVIDENCE INSUFFICIENT IN LAW. — Where the evidence is insufficient, as matter of law, to justify a verdict, or decision that a will was executed under undue influence, it is ground for a new trial. The evidence in this case reviewed, and held insufficient in law to sustain such a verdict.

11. — EVIDENCE — DECLARATIONS OF TESTATOR — TESTAMENTARY INTENTIONS — RES GESTÆ — WEIGHT OF EVIDENCE. — Expressions of the deceased as to his testamentary intentions, though admissible to prove a friendly feeling toward the persons in regard to whom they are used, yet do not tend to prove that a will conforming to such expressions was procured through undue influence, unless made so near the time of the execution of the will as to constitute a part of the *res gestæ*; and where the testator is beyond question of sound mind, they are entitled to no weight at all, in the absence of proof of influence as to the very testamentary act.

12. — FAIRNESS OF TESTAMENTARY DISPOSITION — DIVISION OF PROPERTY AMONG NEPHEWS AND NIECES. — Not to divide the property of a testator equally among nephews and nieces does not make his will undutiful or inequitable. An uncle is under no obligation, ordinarily, to provide for his nephews, either when living or by his will.

13. — JUDICIAL DISPOSITION. — A testator of sound mind has a right to make an unjust, unreasonable, or even a cruel will, and if no apparent re-

strait or undue influence is proved to have induced its execution, the will must be sustained, whether the disposition made of his property is judicious or not.

- 1D. — GENERAL INFLUENCE — EVIDENCE — PRESUMPTION. — General influence, not brought to bear directly upon the testamentary act, however strong or controlling, is not undue influence, such as will afford ground for the setting aside of a will of a person of sound mind. There must be evidence, either direct or circumstantial, that pressure was brought to bear directly upon the testamentary act, and there is no presumption against the will, except in cases where the beneficiaries, or parties instrumental in having the will executed, sustain a confidential relation to the testator, or where the testator is weak, physically and mentally, and those having exclusive access to him have procured an unnatural will.
- 1D. — CIRCUMSTANTIAL EVIDENCE — SUSPICION — DEGREE OF PROOF REQUIRED. — While circumstantial evidence may be sufficient to prove undue influence upon the testamentary act, it must do more than raise a suspicion, and has the force of proof only when the circumstances proved are inconsistent with the claim that the will was the spontaneous act of the testator. It does not amount to proof if the circumstances are equally consistent with the theory of undue influence, and with the hypothesis that the will was the free act of an intelligent mind, especially if other circumstances are wholly inconsistent with the hypothesis of undue influence.
- 1D. — PRESUMPTION OF LAW. — The presumption of law, in the absence of all proof, upon the contest of a will, is in favor of the will.
- 1D. — DISMISSAL — FAILURE TO ENTER JUDGMENT — DISCRETION — REVIEW UPON APPEAL. — Where it appears that the contestant of a will had paid the clerk the requisite fee for the entry of any judgment that might be recovered in his favor, and that upon the date of the verdict a judgment was signed in accordance with the verdict, which the clerk was requested to enter, and which the contestant believed was entered, until after service of a notice of motion to dismiss the cause for failure to have the judgment entered within six months after the verdict, the discretion of the court below in refusing to dismiss the cause upon that ground will not be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, from orders refusing a new trial, and refusing to dismiss the cause for failure to have judgment entered within six months from the date of the verdict.

The facts in regard to the contest of the will are stated in the opinion. On the motion to dismiss the judgment, the affidavit of the contestant showed that he had paid the clerk's fee for entering the judgment, and that the judgment was signed at the date of the verdict, August 11, 1889, and that the clerk was requested to

enter it, and that he supposed in good faith that it had been entered. It was not in fact entered until May 2, 1891. The motion to dismiss the cause for failure to enter the judgment within six months after the verdict was dated April 29, 1891, and was noticed for hearing May 1, 1891. The court refused the motion.

Jones & O'Donnell, E. W. McKinstry, and E. F. Preston,
for Appellant.

Declarations made prior to the execution of the will are not admissible to prove the fact of undue influence, and are not admissible to prove even the state of the mind of the testator, unless it is offered in connection with other evidence tending to prove mental incapacity, where such issue is necessarily involved. (1 Redfield on Wills, 554, 557; *Jones v. Roberts*, 37 Mo. App. 181; *Cawthorn v. Haynes*, 24 Mo. 236; *Tingley v. Cowgill*, 48 Mo. 291; *Spoonmore v. Cuble*, 66 Mo. 579; *Rule v. Maupin*, 84 Mo. 587; *Bush v. Bush*, 87 Mo. 480; *Middleditch v. Williams*, 45 N. J. Eq. 736; *Rusling v. Rusling*, 36 N. J. Eq. 120; *Herster v. Herster*, 122 Pa. St. 239; *Den v. Van Cleve*, 4 Wash. C. C. 262; *Boylan v. Meeker*, 28 N. J. L. 274; *Pemberton v. Pemberton*, 41 N. J. Eq. 349; *In re Pemberton*, 40 N. J. Eq. 520; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Van Valkenburg v. Van Valkenburg*, 90 Ind. 438.) It was error for the court to refuse to limit the declarations of the testator, admitted, not as proof of the fact of undue influence, but for the purpose of showing the state of mind of the testator, to the purpose for which they were received. (1 Redfield on Wills, 4th ed., 549; *Jones v. Roberts*, 37 Mo. App. 181; *Herster v. Herster*, 122 Pa. St. 239; *Will of Storer*, 28 Minn. 9; Hayne on New Trial and Appeal, sec. 106; *Voorman v. Voight*, 46 Cal. 398; *People v. Collins*, 48 Cal. 277; *People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 53 Cal. 614; *Henry v. Everts*, 29 Cal. 610; *Williams v. Hartford Ins. Co.*, 54 Cal. 449; *Alexander v. Denaveaux*, 59 Cal. 476; *Potter v. Baldwin*, 133 Mass. 427.) As the testimony mainly relied upon by the contestants con-

sisted of declarations of decedent made at remote periods prior to the execution of the will, and moreover, the declarations had no reference whatever to any testamentary act, the motion for a nonsuit should have been granted. (See *Boylan v. Meeker*, 28 N. J. L. 274; *In re Bennett's Will*, 6 N. Y. Sup. Ct. 199; *Mason v. Williams*, 6 N. Y. Sup. Ct. 479; *In re McKenna's Will*, 4 N. Y. Sup. Ct. 458; *In re Johnson's Will*, 5 N. Y. Sup. Ct. 792; *In re White's Will*, 5 N. Y. Sup. Ct. 295; *Latham v. Schaaf*, 25 Neb. 535; *Herster v. Herster*, 122 Pa. St. 239; *Will of Storer*, 28 Minn. 9.) To prove undue influence, it must be shown that such influence was exercised at the very time of making the will. (*Webber v. Sullivan*, 58 Iowa, 260; 1 Redfield on Wills, sec. 534; *Eckert v. Flowry*, 48 Pa. St. 46.)

P. F. Dunne, and *Thomas F. Barry*, for Respondents.

Evidence as to the conduct, acts, and declarations of the testator, tending to show the state of his mind and feelings inconsistent with his testamentary act, was clearly admissible. (*Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71; *Boylan v. Meeker*, 28 N. J. L. 274; *Bates v. Bates*, 27 Iowa, 110; 1 Am. Rep. 263; *Canada's Appeal*, 47 Conn. 450; *Colvin v. Warford*, 20 Md. 357; *Beaubien v. Cicotte*, 12 Mich. 459; *Forney v. Farrell*, 4 W. Va. 729; *Thompson v. Updegraff*, 3 W. Va. 629; *Reel v. Reel*, 1 Hawks, 247; 9 Am. Dec. 632. See also, on same subject, Schouler on Wills, sec. 243.) The declarations of a testator of his intention to make certain testamentary dispositions are admissible as evidence of such purpose, and a long-cherished purpose of the testator, inconsistent with the actual provisions of the will, may also be shown. (1 Redfield on Wills, 529, 537, 552, 560, 566; Schouler on Wills, secs. 242, 243; and see also *Seale v. Chambliss*, 35 Ala. 19; *Beaubien v. Cicotte*, 12 Mich. 459; *Will of Mary Ames*, 51 Iowa, 396; *Thompson's Will*, 13 Phila. 403; *Forney v. Farrell*, 4 W. Va. 729; *Lee v. Dill*, 11 Abb. Pr. 214; *In re Welch*, 1 Redf. 238; *Brydges v. King*, 1 Hagg. Const. 256.) Whether a will is contested

for incapacity or for fraud, or undue influence, it is always proper to inquire whether the provisions of the will are just and reasonable, and accord with the state of the testator's family relations, or the contrary; for if they are, that circumstance is decidedly favorable to sustaining the will; while, on the other hand, if it makes an inequitable distribution of the property, or one quite different from what was naturally to be expected, this circumstance tends in the opposite direction. Gross and unaccountable inequalities in the disposition of a will require, in general, some satisfactory evidence that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind; and when such evidence is wanting, the will should be set aside. (Schouler on Wills, sec. 238; and to the same effect, *Fountain v. Brown*, 38 Ala. 72; *Harold v. Harold*, 1 Daveis, 203; *Waters v. Cullen*, 2 Bradf. 354.)

TEMPLE, C. — This proceeding is to contest the will of decedent, and the appeal is taken by the beneficiaries under the will from a judgment in favor of the contestants, from an order refusing a new trial, and from an order refusing to dismiss the proceeding on the ground that the judgment was not entered within six months after its rendition.

Charles McDevitt died on the 28th of February, 1890, at the age of sixty-five years. The will in question was executed September 27, 1889.

The testator, at the time this will was executed, was an invalid, suffering from internal cancer, from which he finally died. He seems, however, not to have been so ill as to prevent his going out. One of the contestants, James McDevitt, testified that he and his family saw him nearly every day until three or four months before he died, and further, "I saw Uncle Charlie in our yard about a month or so before he died. He looked sickly then, and was as white as the wall. He died by inches."

Deceased was at the time living with his brother An-

drew, some distance from the residence of the witness. So that he must have been going about for several months after the will was executed.

Deceased was a bachelor. He was a native of Ireland, and it appears that he had at one time three brothers and a sister living in San Francisco. The brothers were all married. Two, Michael and James, died before the testator, each having several children, the contestants herein.

James McDevitt, the father of some of the contestants, and the deceased were at one time partners in the draying business in San Francisco. The business prospered, and they purchased a ranch in Sonoma County, which was managed by the deceased, while James managed the draying business. About ten years before the testator's death there were business differences between himself and James, which resulted in litigation, and the dissolution of the co-partnership. Prior to that time, when visiting the city, which he did two or three times a year, the testator lived with his brother James. At the time of the litigation he went to live with his brother Andrew, and continued to reside there until his death, about ten years later. After the dissolution, James became the owner of the ranch, and Charles of the real estate, which now constitutes his estate.

The deceased left as heirs a sister, residing in Massachusetts, a brother, Andrew, at whose residence he died, seven nephews and nieces, children of his deceased brother James, and five nephews and nieces, children of a deceased brother Michael. All except the sister resided at San Francisco.

In the will, executed, as we have seen, five months before his death, the deceased gave one thousand dollars to his sister, and all the residue of his estate to his brother Andrew and members of his family. The will contained the following: "I make no provision for the children of my deceased brother James McDevitt, nor those of my deceased brother Michael McDevitt, and

my omission to provide for them is therefore intentional."

The contest is upon the ground that the will was procured through the undue influence of Andrew McDevitt, in this, that decedent had, prior to the execution of the will, for several years been living at the house of Andrew, and had become subject to the wishes and much in fear of and dominated by him; that at the time decedent had been sick and suffering, and became enfeebled in mind and body, and while in that condition was not permitted by said Andrew to see and converse with any of his relations except the immediate family of said Andrew, and was falsely told by said Andrew that his relations, except said Andrew and his family, cared nothing for him, and he ought not to do anything for them, and was urged and importuned by said Andrew, while in said condition, to make a will giving all his estate to Andrew and his family; that, unable to resist the importunities, decedent made his mark to said will.

The contest was tried with a jury, and by stipulation the only issue was: "Did the said Charles McDevitt, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of Andrew McDevitt?" To which the jury answered yes, and the findings of the court were in accordance with the verdict.

The appellant contends that the statement of the contest is insufficient, because in the specifications of the acts of undue influence the past tense is used; but I think the concluding sentence, "that at said date, and while in said condition, and unable to resist the importunities of said Andrew, deceased made his mark to said pretended will," sufficiently connects the alleged undue influence with the testamentary act.

The appellant makes several points, either of which, he contends, requires a reversal. After a careful examination, I am convinced that the evidence is insufficient, as matter of law, to justify the verdict and decision.

This is one of the grounds of the motion for a new trial. If this position be correct, the other points become matters of little consequence. I shall therefore proceed to consider this question.

It may be premised, in the first place, that sixty-five is not such an advanced age as of itself to suggest senility, and that the evidence shows, without conflict, that the testator was a man of sound mind and memory, and of strong will. There is no evidence which tends to show impairment of intellect, unless bad health necessarily has that effect.

In the next place, there is no proof whatever that he was urged or importuned by Andrew or any one else to make a will, or that it was ever suggested by any one that he ought to give his property to Andrew or any one else. It does not appear that the subject of the testamentary disposition of his property was ever mentioned except to contestants, and Andrew testified that he did not know that a will had been made until after the death of the testator, who had sent him, as he says, to get a lawyer to look after his rents; neither Andrew nor any member of his family was present when the will was executed, although it was at Andrew's house.

The will, when executed, was taken away by the attorney, and there was no proof that any member of Andrew's family knew of it.

The witnesses to the will testify to the evident capacity of the testator, the careful reading of the will, and the emphatic approval by the testator of the clause which expressed his intention to exclude the contestants.

Upon the question whether decedent was not permitted to converse privately with contestants, the testimony on behalf of contestants shows, I think, beyond all controversy, not only that the charge is not sustained, but that the contrary is true. No relative was ever denied access to deceased, but on the contrary, whenever any called to see him, they were politely received and kindly treated. Nor do I think the effort to show that Mrs. Andrew McDevitt always remained present during such

interviews a success. Very few of the contestants ever called at all, and these but seldom. This lack of attention is excused on the ground that they had business differences with their Uncle Andrew, and did not think they were welcome at his house; but this does not tend to prove that they were prevented from seeing their Uncle Charles. And besides, the deceased was out and around, more or less, even during his last illness. Some of the contestants occupied the property which constitutes the estate, and many of them testify that they saw decedent frequently at the wharf, and at his property where some of them lived. It does not appear that he was attended by any one during these times, and it is absurd to say that they could not have seen him and conversed with him privately had they desired. There is no evidence tending to show that there was any period during which they did not so meet the decedent, and it appears affirmatively from their own testimony that some of them did so see him during his last illness, and for three months or more after the will was executed.

James McDevitt, son of James McDevitt, deceased, brother of the testator, testified: "Afterwards [after his father's death] we saw him nearly every day until three or four months before he died." And again: "I saw Uncle Charlie in our yard about a month or so before he died."

There is no evidence tending to prove that Andrew McDevitt, or any one else, ever told decedent that none of his relatives except Andrew and his family cared for him. There is, however, testimony to which that construction may be given, so far as the children of James McDevitt are concerned, which is hereafter set out. Giving this the full effect that can be claimed for it, it still utterly fails to prove the allegation in the statement of the grounds of contest.

To prove the friendly relations existing between the decedent and the contestants, they were allowed to put in evidence several expressions of the deceased as to his testamentary intentions. That these expressions as a

general thing do tend, in some measure, to prove a friendly feeling toward the persons in regard to whom they were used, cannot be denied. They were, therefore, properly received. But unless made so near the time the will was executed as to constitute a part of the *res gestæ*, they did not tend to prove that the will was procured through undue influence merely because it does not conform to these expressions. Although, therefore, such statements, when made under such circumstances as to show friendliness, are admissible for that purpose, the effect should be carefully limited by the court to the one for which they are admissible. Only so far as the friendly relations of the parties may have such effect can they throw any light upon the testamentary intentions of the decedent at the time of the execution of the will. In fact, in a case like this, where the testator was, beyond question, of sound mind, they were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act.

None of these expressions as to testamentary intent were sufficiently near the testamentary act to constitute them part of the *res gestæ*. One instance is shown, however, of such declarations, which must have been after the execution of the will, and within two or three months of the time. I think there are no others brought within a year of that act. Charles McDevitt, son of James McDevitt, testified that he went to see decedent at Andrew McDevitt's house in regard to the rents; that after some conversation, Uncle Charlie said, when he saw Uncle Andrew coming: "'Sh! say nothing; it will all be yours by and by. . . . Q. Well, did he drop the conversation with you, or did he drop it after Andrew came up? A. He dropped it. The deceased acted as though he were afraid of Andrew; never seemed to talk freely except when he was away." On cross-examination he said the remark was: "Go ahead, you folks will have it when I am gone." The witness also stated that this happened two or three months before his uncle died. This witness also testified that he called three times during his uncle's

illness. The second time Mrs. McDevitt ushered him into the room where his uncle was, and left him alone with him. He was treated kindly and politely by Andrew McDevitt's family.

Whether by this statement the decedent intended to deceive the witness, or at the time intended to execute a new will, is alike immaterial. In neither case would it tend to prove that the will which had been executed was procured by undue influence. For that purpose the evidence would have been incompetent, except in connection with evidence tending to show fraud in procuring the will, or mental unsoundness. In the last case it might tend to prove that the alleged testator did not know the nature of the will he had executed. There is no chance for such supposition here. Although there is a charge of mental weakness in the contest, there was no proof tending to establish it unless proof of physical infirmity constitutes such proof. That it did not go to this extent here we have seen. On the other hand, it is shown that he was a man of sound mind and strong will. The attending physician, and the attorney who drew the will, and another subscribing witness, show beyond doubt his sound mental condition at the time, and thorough understanding of the will. Under such circumstances, this evidence, and all other of like character, is entitled to no weight. (*Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71.)

Another witness, whose testimony has already been alluded to as showing an effort to prejudice the alleged testator against some of his nephews and nieces, and who also stated facts tending to show that decedent greatly feared his brother Andrew, is Charles McDevitt, son of Michael McDevitt. He was a boy about thirteen years of age when his mother died. His Uncle Charles, on various occasions, took great interest in him as a bright lad, and one who was not strong, and therefore unable to do hard work. Several times it is shown that Uncle Charles had expressed his intention to assist in educating him, and had declared that he would provide

for him. So far as I can find, these declarations were made at least two years before the will was executed, though some do not seem to be located as to time. After his mother's death, his Uncle Charley took him to live with himself at his Uncle Andrew's, who, however, boarded both his Uncle Charley and him without pay. He went there about February 7, 1886, and remained from four to six months. During this time the conversations testified to occurred. All must have been, therefore, more than three years before the execution of the will.

He says his Uncle Charley looked after his schooling, bought books and clothes, and furnished him spending money, etc. Further: "I heard Andrew, after he would find out that Charley had been down to see James's folks on Sansome Street, abuse him about it. This would only happen after the tenants in the house, who used to play cards with them evenings, had retired. . . . He would say, 'I heard you have been down to your brother Jim's to-day'; and Uncle Charley would not make any reply, and Uncle Andrew would say, 'You damn dirty old fool, don't you know you ought to have better sense than to go there and see those people? You will allow those girls [having reference to Uncle Jim's daughters] to kiss and love you, and sponge all they can out of you; but it is not for love of you, but for love of your money, and, you damn old fool, you have not got sense enough to see through that.' . . . Uncle Andrew repeatedly told Uncle Charles, 'Why, damn you, only for the way I went to court and lied like I did, and went around at the time of the lawsuit, you would not own one half of that property that you now own, that is your possession.' Charles would never make any answer. Uncle Andrew used to call Uncle Charles an old crawler. . . . Generally in the morning we had a habit of getting up at half-past seven or a little later, and if my Uncle Andrew would get up before me, my Uncle Charley would say, 'How are you?' and I would say, 'All right.' 'Sleep good?' 'All right'; and my Uncle Andrew would be in

the dining-room, and he would pull out a cat-o'-nine-tails and give me a good thrashing. I was not a bad boy, but was in bed. . . . When I would talk to Uncle Charley about Andrew's licking me he would say, 'Don't let your Uncle Andy know that you are coming to me complaining; don't expect me to stick up for you, because you know how he abuses me; and if I should attempt to stick up for you in any manner, I would get the same as you get.' Uncle Andy would pull me out of bed and lick me. He did this about half a dozen times during the six months that I was there. . . . I only heard Andrew call him a crawler from my bed. On no other occasion did I hear it. Uncle Charley appeared to me to be afraid of Uncle Andrew. Uncle Charley told me that he was afraid Uncle Andy would lick him if he would stick up for me. He says, 'Never ask me to stick up for you, because if I would make the least attempt to stick up for you when Uncle Andrew is beating or abusing you, I would get the same from him.' "

He also testified that his Uncle Andrew used to beat his children too, and that when his Uncle Charley said he had applied for letters of guardianship for him, the witness, Uncle Andrew abused them both, saying that his brother and sisters were grown up and working, and able to support him (the witness), and he ought to go to them, and not to Uncle Charley; that he did not tell his father, or his brothers or sisters, about the beatings he received, only complained to Uncle Charley.

I think I have now made a full and fair statement of the contestants' case, and that the extracts given include all that can be claimed to bear upon the question whether Andrew McDevitt exercised or attempted to exercise any influence over the deceased as to the testamentary act. Does this testimony, admitting its entire truthfulness, taken in connection with the other uncontradicted evidence, make out a case for the contestants? I think it does not.

The other facts have been already suggested. They are the undoubted mental soundness of the testator,

the clear proof of his intelligent execution of the will, the fact that he alone instructed his attorney how to draw his will, and the entire absence of evidence that any pressure was brought to bear upon him at any time, by any one, in regard to the testamentary disposition of his estate. The scrivener did not know that any one else was aware that a will was contemplated. At all events, the decedent, unaided, gave him all his instructions. In fact, the only parties spoken to in regard to his testamentary intentions, so far as disclosed by the evidence, were the contestants themselves, except, perhaps, the witness Murray.

If efforts were made to prejudice the testator against the contestants, it is shown only by the testimony above set out, given by the younger Charles McDevitt. It had reference only to the children of James, with whom deceased had had trouble and litigation, and does not seem to have reference to testamentary favors which these children might expect, but to Andrew's fear that they were getting money from his brother Charles. It was three years, at least, before the execution of the will; but had they been made at the very time, they would not have been sufficient even then, of themselves, to throw the burden of proof upon the proponents, the mental competency of the testator being as clearly proven as in this case.

As to the statement that the testator lived in fear of personal violence from his brother Andrew, it is simply incredible. Nor is it necessary to discredit the witness to come to this conclusion. Allowing that he said all that the witness affirms, it shows that he very properly refused to interfere with the order maintained by Andrew in his own house, and his statement of fear was to be rid of complaints. I understand the matter differently from the boy. To me it seems probable from the statements that his uncle approved of the punishment. What brutes it makes of both to suppose that Charles, when nothing had been said to him by Andrew about it, gratuitously believed that he, a man over sixty years of

age, would have been whipped with a cat-o'-nine-tails by his brother for merely suggesting that the boy ought not to be punished; why did Charles remain with Andrew if he was so constantly abused and lived in such fear? He was able to provide for himself. He had then another brother living in San Francisco, and many affectionate nephews and nieces. Some were living in his own house, and he is represented as saying that he considered it his home, and would go there to live but for his brother Andrew. If constantly called such opprobrious names and in fear, why did he not do so? Some people who are friendly still talk roughly, and we can only comprehend the condition here by supposing that these brothers were of that character. The evidence, however, removes all suspicion that Andrew attempted by flattery or simulated kindness to get the good-will of his brother, and steal his inclinations in that way.

The will is not an undutiful will. Not to divide property equally among nephews and nieces does not make it an inequitable will. An uncle is under no obligations, ordinarily, to provide for his nephews, either when living or by his will. Failure to name them in the will does not, under the statute, raise a presumption that they were forgotten. Circumstances may be such that failure to provide for one who is a stranger in blood may seem inequitable. No such circumstances exist here with reference to any of the contestants. It has been held, however, that the mere fact that children are unprovided for and the estate given to strangers does not throw upon the beneficiaries the burden of proving fairness. (Redfield on Wills, 526, and cases cited.) The will is not at variance with natural instincts. Charles McDevitt, the alleged testator, had no descendants, no one for whom a natural duty rested upon him to provide. He had quarreled with his brother James, and had had a lawsuit with him, which must have been somewhat bitter. From the testimony of young Charles McDevitt, we must infer that Andrew, in that quarrel, had been a

warm partisan of Charles. Soon after the trouble began, he went to live with Andrew, who apparently had just married. He remained with Andrew ten years, until his death, during which time he was generally more or less of an invalid, and several times was ill. At all these times, as during his last illness, he was cared for by Mrs. Andrew McDevitt. None of the contestants assisted or ever offered to assist in caring for him. Perhaps they had a valid reason for not doing so in their disagreements with Andrew about property. But nevertheless there is the fact. They were not present at these times of trial. The family of Andrew was present. Good feeling thus won does not invalidate the will, although the services may be rendered to induce testamentary favor. Five children were born in the house while the testator was an inmate. Contestants themselves concede that he was much attached to these children. He would have been less than human, and they most unattractive, if they did not get close to the old man's heart. For his board at the house of Andrew he never paid or offered to pay one cent. He required more money than he was getting for rents, to improve his property. He borrowed some three thousand seven hundred dollars from Andrew for this purpose. No part of this was ever paid, nor was any obligation given for it. Andrew was his only surviving brother, and the evidence only shows one sister, living in Massachusetts, whom he had not seen for years.

Is this will, executed under such circumstances, unnatural or inequitable? I think not. This being so, then I say that the testimony of the contestants, in connection with the clear and uncontradicted testimony that the will was dictated and executed by an understanding mind, in the absence of apparent restraint or influence, does not raise a presumption that Andrew McDevitt procured its execution by the use of undue influence.

We are not called upon to approve the will, and may regret that the boy Charles was not provided for; but

there was no duty resting upon the testator with reference to him, such as we would impute to a parent.

Although I do not think it of special interest here, it is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, is the will the spontaneous act of a competent testator?

Of course juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper.

General influence, not brought to bear upon the testamentary act, however strong or controlling, is not undue influence. There must be proof that the influence was used directly to procure the will, except in those cases where the beneficiaries or parties instrumental in having the will executed sustained a confidential relation to the testator. This case is not within the exception. In the long list of cases I have examined, the only further exception I find is, that it has sometimes been held that when a testator is weak, physically and mentally, and those having exclusive access to him have procured what may be called an unnatural will,—one which we would conclude would be against the natural instincts of the testator,—a presumption is raised against the will.

Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are

proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind. This does not amount to proof. And many circumstances are shown which are wholly inconsistent with the hypothesis of undue influence. And the presumption of law, in the absence of all proof, in a contest, is in favor of the will.

As to the order made after judgment, it is enough to say that I do not think this court should interfere with the action of the trial court.

I think the judgment and order denying a new trial should be reversed, and a new trial ordered, and that the order refusing to dismiss should be affirmed.

BELCHER, C., and VANCLIFF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed. Motion to dismiss denied.

[No. 14275. Department Two.—June 17, 1892.]

IN THE MATTER OF THE ESTATE OF FERRIS JEWETT
MOORE, DECEASED.

ESTATES OF DECEDENTS—SETTLEMENT OF FINAL ACCOUNT—ORDER APPOINTING EXECUTOR—NOTICE TO HEIRS—ESTOPPEL.—Where the order appointing an executor, and under which he qualified as such, recited that citations had been duly issued and served, and notices duly given according to law, and the executor took charge of the property of the estate as executor, holding possession thereof for many years until cited by a legatee to render a final account, claiming no right save as executor, he is estopped from claiming, upon a settlement of his final account, that the order appointing him as executor was void because proper citations to the heirs were not issued and served.

ID.—DEVISE IN TRUST—ACCUMULATION FOR BENEFIT OF SON—SUPPORT OF FAMILY—NEGLECT OF EXECUTOR.—Where an executor was appointed by the will of the testator as a trustee to invest a sum of money in trust for the testator's son, and to allow the increase to accumulate until the son should attain majority, when the sum, and the increase thereof, was to be paid him, and in the next clause of the will the residue of the estate, after the payment of debts, was given to the executor, in trust, to pay the interest thereon, and so much of the principal as might be necessary, to the widow of the testator, for her support, and for the support and education of his son, the expenditure by the executor of a large sum for the erection of a building upon property belonging to the estate, the rents of which were paid to the boy's mother for their support, cannot take the place of the investment first directed to be made, and accumulated for the benefit of the son, or excuse the failure of the executor to make such investment.

ID.—LIABILITY OF EXECUTOR—USE OF LEGAL-TENDER NOTES TO BE INVESTED IN TRUST—GOLD VALUE—INTEREST.—Where the executor failed to procure an order to distribute the sum of three thousand dollars in legal-tender notes, devised to him as trustee, in trust, for investment and accumulation of interest, and made no investment thereof, but used the money in his own business for many years, he is chargeable in his final account with the value of the legal-tender notes in gold at the time when the investment should have been made, with interest on such value, and cannot be charged with the difference between the face amount of the legal-tender notes and their value in gold, and interest on the face amount of the notes.

APPEAL from an order of the Superior Court of Sacramento County denying a new trial.

The facts are stated in the opinion.

Johnson, Johnson & Johnson, for Appellant.

George A. Blanchard, and *Catlin & Blanchard*, for Respondent.

TEMPLE, C.—Appeal from an order denying a motion for a new trial upon a contest over the final account of an executor.

The testator died in 1868, leaving a widow and one child,—a son about ten months old. The will was admitted to probate May 11, 1868, and the appellant was appointed executor, and at once qualified and entered upon his duties as such. He returned an inventory of the estate July 7, 1868, which showed personal property of the value of \$15,176, and two lots in Sacramento appraised at

\$1,461. The personal property consisted of solvent debts and a stock of goods. The latter were sold for nearly one thousand dollars above the appraised value, after paying the expenses of sale, and the sale was approved April 27, 1870.

Notice to creditors was duly published May 11, 1868. No claims against the estate were presented.

The executor rendered no account of his administration until December, 1879, and then rendered no formal account, as required by the statute, but only a statement of certain moneys received from his agent in charge of the property, or some of it, and disbursements made by him.

In August, 1884, he filed a second account, which purports only to be a statement of receipts of rents and the disbursements of the same. A similar account, equally defective, was filed March 8, 1889.

Having been cited to render a final account by the legatee, who had arrived at the age of majority, he filed what purports to be a final account June 21, 1889. This is little more than a recapitulation of the former reports, and also wholly fails to show what had become of the moneys received by the executor, except as to the rents of the real property received since the testator's death, which, it seems, amounted to \$12,704. The court, however, proceeded to ascertain a balance from the evidence, and entered a final decree accordingly, adjudging the executor indebted to said estate in the sum of \$12,577.50.

No brief has been filed on behalf of the respondent.

The executor, on this appeal, objects that the order appointing him as such executor is void, because proper citations to the heirs were not issued and served. He took charge of the property of the estate as executor, having duly qualified under the order. For twenty odd years he has remained in possession, claiming no right save as executor, and now presents his final account as such, asking for a settlement and discharge, and in the very proceeding objects to the jurisdiction of the court. The order appointing him, and under which he quali-

fied, recites that citations had been duly issued and served, and notices duly given according to law. If the notices were not in fact given, it was the fault of the appellant, and his taking possession of the estate was wrongful. He cannot make this objection. (*Moore v. Earl*, 91 Cal. 632.)

It seems that the executor, without authority, used some five thousand dollars of the money of the estate to erect a building upon one of the lots belonging to the estate in Sacramento. The rents of this building have since been paid to the surviving widow of the testator, who has supported Ferris Jewett Moore, Jr., son of the testator.

The ninth subdivision of the will is as follows: "I give and bequeath to my said executor the sum of three thousand dollars in trust of [for] my son, Ferris Jewett Moore, Jr., and I direct my said executor to invest and keep invested the said sum of three thousand dollars, and allow the increase thereof to accumulate, and when my said son shall arrive at his majority, I direct my said executor to pay over to him the said sum, and the increase thereof, and in the event of the death of my said son during his minority, then the same shall go [to] my heirs forever."

By the tenth subdivision, the testator gave to his executor the residue of the estate, after paying the debts, expenses, and other legacies, in trust, to pay the interest thereon, and so much of the principal as might be necessary, to his widow, for her support, while she remained his widow, and for the support and education of his son until he should arrive at the age of majority. By a previous provision in the will, the executor was authorized to sell at public or private sale all the property of the estate, real or personal, and convert the same into money or securities, and directed to pay all bequests, legacies, and appropriations in the will in United States legal-tender currency, which the probate court construed to mean legal-tender notes.

The executor, as the court decided, did not make the

investment directed by the ninth subdivision of the will, and therefore the court charged him with the three thousand dollars, and credited him with two thousand two hundred dollars, the cost, in gold, in 1870, of three thousand dollars, legal-tender notes. Legal interest was then computed upon this sum until the accounting.

Appellant claims that he did invest this three thousand dollars in the building placed upon the lot belonging to the estate. This claim the probate court decided against him, and we think correctly. There are many cogent and obvious reasons for holding that the money expended in the erection of this building was not an investment under the ninth subdivision of the will. And notwithstanding his positive testimony to that effect, it is also obvious that the executor himself did not so consider it. Under that subdivision he was required to allow the increase to accumulate. In fact, he paid the rents to the mother of the legatee for his support, as he was required to do with the profits of the property held by him in trust under the tenth subdivision.

We cannot see, however, what authority the court had to charge the executor with the difference between the value of the money held by him, as executor, in gold, and three thousand dollars in legal-tender notes, which is virtually what it did by the method pursued.

By the ninth subdivision, Hathaway was vested with this money as trustee. Had the trustee named been a third person, the payment by the executor to such trustee would have entitled him to a credit for that amount. As he was himself the trustee, he should have procured an order distributing the amount to himself as trustee, and should have made the investment. Perhaps, had he in fact made the investment, the same result would have followed, and he would, as executor, have been entitled to a credit of that sum. But he procured no such partial distribution, and made no investment of the money. It would seem to follow, then, that he still held the money as executor, and his default consists in not promptly settling the estate. It was also found that he

used the money in his own business. This would make him liable for interest.

If these views are correct, the other points made do not seem to be of consequence.

The result would be, that the decree should be modified by simply deducting from the balance found the amount by which it was increased, by charging the profit which would have been made if three thousand dollars in legal-tender notes had been purchased, which can easily be done.

BELCHER, C., and VANOLIEF, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the order appealed from is reversed, and the court below is directed to modify its decree settling the account of the appellant, by charging him therein with the sum of two thousand two hundred dollars as the amount of the legacy given by Ferris Jewett Moore, Jr., by the last will and testament of Ferris Jewett Moore, deceased, instead of the sum of three thousand dollars in legal-tender notes, and calculating interest on said sum of two thousand two hundred dollars in the same manner and for the same periods as it is calculated in the report of the referee on three thousand dollars.

[No. 15071. Department Two.—June 17, 1892.]

HANNAH GREEN, PETITIONER, v. J. C. B. HEBBARD, JUDGE OF THE SUPERIOR COURT, RESPONDENT.

APPEALABLE ORDER — ORDER REFUSING TO VACATE ORDER FOR WRIT OF POSSESSION — MOTION BY STRANGER TO RECORD. — An appeal lies from an order denying the motion of one not a party to the record to vacate or modify an order for a writ of possession.

ID. — STAY OF EXECUTION — DUTY OF COURT TO FIX BOND — MANDAMUS. — One having a right of appeal from such order may insist upon the duty of the court to fix the amount of the undertaking necessary to stay the operation of the writ of possession, under section 945 of the Code of Civil

Procedure, and the discharge of such duty may be compelled by writ of mandate.

12. — MERITS OF APPEAL NOT CONSIDERED. — Upon application for a writ of mandate to compel the court to fix the amount of a bond to stay execution, the merits of the ruling appealed from cannot be considered.

APPLICATION to the Supreme Court for a writ of mandate.

The petition sets forth a recovery of the possession of a tract of land in an action of ejectment brought August 12, 1873, by William Ford, in the superior court of the city and county of San Francisco, against the husband of petitioner B. S. Green, and other defendants, to which action petitioner was not a party. On the fourth day of August, 1881, judgment was entered in said action by default against said B. S. Green, and in favor of H. C. Hyde, assignee of said Ford; and on November 20, 1888, a writ of possession was issued and executed by dispossessing certain tenants, and by petitioner, who was in possession of a certain part of the land, attorning to the plaintiff's successor in interest. The order granting this writ was subsequently annulled. On March 26, 1892, R. S. Thornton, claiming to be a grantee of B. S. Green, procured an order without notice, awarding a writ of possession in his favor, which order both petitioner and plaintiff's assignee moved to vacate, and that motion was denied on the thirty-first day of May, 1892. From the order denying this motion, petitioner sought to appeal, and moved the court to fix the amount of an undertaking to stay execution of the order to be appealed from. The motion was refused, whereupon petitioner presented this application for a writ of mandate to compel the fixing of the amount of the undertaking.

T. M. Osmont, for Petitioner.

Edward F. Fitzpatrick, for Respondent.

THE COURT. — The petitioner is entitled to appeal from the order denying her motion to vacate or modify the

order made in the action of *Hyde v. Boyle*, for the writ of possession. (*People v. Grant*, 45 Cal. 97; *City of San José v. Fulton*, 45 Cal. 316.) Having the right of appeal, it is the duty of the respondent upon her application to fix the amount of the undertaking necessary to stay the operation of the writ of possession, under section 945 of the Code of Civil Procedure.

We cannot upon this present application consider whether the court was right or wrong in its ruling upon petitioner's motion to vacate or modify the order for the issuance of the writ of possession, as the questions which would be involved in such an appeal are not before us.

Ordered that a peremptory writ of mandate issue in accordance with the prayer of the petition.

Hearing in Bank denied.

[No. 13050. In Bank.—June 17, 1892.]

ELIZABETH NILES, APPELLANT, v. WILLIAM EDWARDS, RESPONDENT.

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT—POWER OF COURT IN BANK—MODIFICATION OF JUDGMENT RENDERED IN DEPARTMENT—REHEARING IN BANK.—Under the constitution of this state, there is but one supreme court, and the jurisdiction which is vested in it may be exercised either in Bank or in Department. The court in Bank has the power to correct an error in, or modify the judgment rendered in, a Department, at any time within thirty days, of its own motion, irrespective of any application therefor, and it is not necessary that the cause be argued in Bank upon an order therefor, to give the court in Bank jurisdiction thereof.

1D.—FAILURE OF CLERK TO ENTER ORDER MODIFYING JUDGMENT.—An order of the supreme court modifying a judgment is not rendered nugatory by reason of the failure of the clerk to enter it in his minutes until after the expiration of thirty days from the time when the judgment was pronounced in Department. The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk.

Motion in the Supreme Court for a *remittitur*. The facts are stated in the opinion of the court.

W. R. Daingerfield, A. F. Morrison, Thomas V. O'Brien, and O'Brien & Daingerfield. for Appellant.

Arthur Rodgers, for Respondent.

HARRISON, J. — Upon an opinion that had been prepared in this cause by Mr. Commissioner Temple, the court in Department Two made an order on the 29th of June, 1891, reversing the judgment, and directing the court below to enter a judgment on the findings in favor of the plaintiff. Subsequently thereto, an application was made on behalf of the respondent that the cause be heard in Bank, and on the 29th of July, 1891, an order was made by the court in Bank modifying the judgment that had been rendered by the Department, and directing that the cause be remanded for a new trial. An opinion embodying the reasons for this modification was at the same time prepared, but it was not filed with the clerk, nor was the order entered in his minutes until the next day. (For a report of the case, see 90 Cal. 10.) The appellant has moved for a *remittitur* upon the judgment originally pronounced in Department Two, upon the ground that the court in Bank has no jurisdiction to modify the judgment of a Department until after the cause has been heard in Bank upon an order therefor, and also upon the ground that the order modifying the judgment was not entered in the minutes of the clerk until after the expiration of thirty days from the time when the judgment had been pronounced in the Department.

Under the constitution of this state, there is but one supreme court, and the jurisdiction which is vested in it may be exercised either in Bank or in Department; and in either case its exercise is of equal import. The jurisdiction of the court in Bank and in Department is co-ordinate, and although in Bank it may exercise a control over the action of a Department, yet such inria-

diction is supervisory, rather than appellate. As the constitution requires the court to "always be open for the transaction of business," any order that is made by a majority of the justices is an order of the court in Bank, and the exercise, by the justices, of this supervisory control of the action of a Department is the action of the court in Bank. Nor is it necessary for the exercise of this supervisory jurisdiction that a distinct order be made that the cause be heard in Bank. The modification, by the court, of the action of a Department implies that it has already given to such action its consideration, and includes or dispenses with the formal order therefor.

The provision in the constitution that within thirty days after judgment has been pronounced in a cause by a Department an order may be made that it be heard and decided in Bank, is merely a provision that the cause may, after such judgment, be considered and determined by the court in Bank, and does not necessarily imply that an additional or oral argument must be made or listened to before it can be so considered or determined.

The term "heard," as here used, is taken from the practice in equity procedure, and corresponds to the term "trial," as used in cases at law. It signifies the consideration and determination of a cause by the court or by a judge, as distinguished from a trial of a cause, which is a term more properly predicated of its determination by a jury. (See 3 Bla. Com. 451, 453; *Akerly v. Vilas*, 24 Wis. 171; 1 Am. Rep. 166; *Merritt v. Portchester*, 8 Hun, 45.) This construction finds support from a consideration of the subsequent clauses of the same section, viz., that the concurrence of four justices "present at the argument" is necessary for a judgment by the court in Bank; and that if four justices "so present" do not concur in a judgment, all the justices qualified to "sit" in the cause "shall hear the argument." These clauses are not to be construed as requiring that a judgment cannot be pronounced by the court in Bank

unless concurred in by four of the justices who were physically present at an oral argument, or that all of the justices qualified to "sit" shall literally "hear" an argument, although it may be conceded that whenever there is an oral argument, only the justices who were present at such argument would be authorized to take part in the decision of the cause. The meaning of these clauses and the construction to be given them is, that the argument shall be "considered" by the court, or by those of the justices who are qualified to "act" in the cause, and that the judgment to be rendered shall be concurred in by four of the justices of the court.

The provision that a judgment pronounced in Department shall not become final until the expiration of thirty days, unless approved in writing by the chief justice and two associate justices, has merely the effect to make definite, by a constitutional requirement, that which, prior to the adoption of the present constitution, existed only by virtue of a rule of court. Within this period of thirty days the case is still within the jurisdiction of the court, and the judgment, as well as the opinion, is subject to its control, and may be changed, modified, or vacated by the court, either in the Department in which it was heard, or in Bank. The provision that the judgment shall become final, unless within that time an order be made that the cause be heard in Bank, has only the effect to limit the time within which the judgment may be changed or modified, but it does not deprive the court of its inherent power to modify or change its judgment without such order, so long as the cause is still pending before it, and has not become final. "It is one of the inherent powers of every appellate court to revise, to modify, and to correct its judgments so long as they are under its control." (*In re Jessup*, 81 Cal. 466.) By the constitution, the judgment that has been pronounced by the court in Department is for thirty days thereafter "under the control" of the court,—not merely under the control of the Department which pronounced the judgment, but of the court in Bank as well,

-- and during that time the court — either the Department which pronounced the judgment, or in Bank — has the authority to modify or to correct the judgment in any particular which it may deem essential to justice. In *In re Jessup*, 81 Cal. 472, the following propositions were held: "1. The perfecting of an appeal gives us jurisdiction of a cause, and that jurisdiction lasts until a *remittitur* is regularly issued; 2. While the cause remains subject to our jurisdiction we have the power, derived from the constitution, to grant a rehearing after judgment, just as we have the power, independent of legislative enactment, to reverse, affirm, or modify the judgment of the inferior court, and to enforce our own judgments; 3. By the constitution, a majority, consisting of four justices, may decide any matter within our jurisdiction."

In the exercise of its power to hear a cause in Bank after a judgment thereon has been pronounced in Department, the court is not limited to an application therefor by a party to the cause, or to the grounds upon which such application may be made, but this power may be exercised by it upon its own motion, irrespective of such application. The Department that pronounced the judgment may itself modify or vacate the same, as may also the court in Bank, or a majority of the justices of the court. An application that a cause may be so heard, whether addressed to the chief justice or to the court, is in fact an application to the court in Bank; and it has been the invariable practice of the court since its organization to consider such applications when convened in Bank. Although the application may be granted upon the order of the chief justice with the concurrence of two associate justices, yet the order is none the less the result of a consideration by the court in Bank, and is to be regarded as the action of the court in Bank, by virtue of the provision in the constitution that an order so made shall have the same effect as if made by a majority of the members of the court.

“When, therefore, the court in Bank, or a majority of the justices, in the exercise of this supervisory control over the action of a Department, determines that the judgment or opinion of the Department should be modified, or that it is erroneous, it has the power to correct such error or to make such modification therein as the nature of the case or justice may seem to demand. Whether this shall be done upon the record already before it in the cause, including the arguments theretofore presented, or whether the court will direct additional argument, rests in its own discretion, and such discretion is to be exercised according to the exigencies of the individual case.

This is the construction which has been invariably given to this section of the constitution. At the first session of the court subsequent to the adoption of the present constitution, after a judgment had been pronounced in Department, the court in Bank modified the opinion that had been rendered by the Department. (*Langley v. Voll*, 54 Cal. 435. See also, to the same point, *Aldrich v. Willis*, 55 Cal. 86; *Pulliam v. Bennett*, 55 Cal. 368.) In *Pollard v. Putnam*, 54 Cal. 630, a judgment had been rendered by the court in Department reversing the cause, and remanding it to the court below, with instructions to enter judgment in favor of the defendant, and thereafter the court in Bank, without making any order that the cause be heard in Bank, modified the judgment by remanding the cause for a new trial. Similar action was had in *Withers v. Little*, 56 Cal. 373; *People v. Miles*, 56 Cal. 402; and in many other subsequent cases. In *Falkner v. Hendy*, 80 Cal. 638, the court in Bank made a radical change in the judgment that had been pronounced in Department, without ordering the cause to be heard in Bank. The Department has itself modified its own judgment. (*O'Connor v. Flynn*, 57 Cal. 297.) These instances (and many more might be added) of the construction given to the constitution by those who were first called upon to expound it have been followed so frequently, and

the practice has been so uniform, that if we had any doubts as to its correctness, we would not feel authorized now to give such a construction as would imply that our predecessors were in error.

The order of the court was not rendered nugatory by reason of the failure of the clerk to enter it in his minutes. The constitution declares that this court "shall always be open for the transaction of business," while the duties of the clerk are, by the constitution, left to be defined by the legislature (art. VI., sec. 14); and under the statute prescribing his duties (Pol. Code, sec. 1031), he is not required to keep his office open upon holidays, or upon any day except between the hours of ten, A. M., and four, P. M. The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk. It was held in *Adams v. Dohrmann*, 63 Cal. 417, that although the last day of the thirty days within which an order granting a hearing in Bank may be made fell upon a holiday, yet, inasmuch as the constitution provides that this court shall always be open for the transaction of business, such holiday was one of the thirty days within which such action must be taken. Inasmuch, however, as the court has the entire period of thirty days within which to take such action, it must result that any action taken upon that day is to be given effect, although the office of the clerk be not open for the purpose of making a record in his minutes of such action, and although no record thereof be made until after the expiration of the thirty days. The same principle makes effective any action of the court that may be taken after the office hours of the day, and the closing of his office by the clerk. The subsequent entry in his minutes does not give any greater effect to the order, but merely perpetuates by record the action of the court. The effect of the order of the court is determined by the fact that it was made

within the limits of its constitutional authority, and any mode which the court itself may adopt for the purpose of authenticating its action is sufficient.

The motion is denied.

McFARLAND, J., GAROUTTE, J., DE HAVEN, J., SHARPSTEIN, J., PATERSON, J., and BEATTY, C. J., concurred.

[No. 16555. In Bank.—June 17, 1892.]

ELLEN REDD, RESPONDENT, v. J. P. MURRY ET UX,
APPELLANTS.

DEEDS—DESCRIPTION OF TOWN LOTS—CERTAINTY—REFERENCE TO PLAT—PAROL EVIDENCE—IDENTITY OF PLAT.—A deed of town lots which gives the dimensions of the boundaries thereof, and describes them by the numbers of the lots and block, referring to a plat thereof, is not upon its face void for uncertainty, though the description is not sufficiently certain without production, by one claiming under it, of the plat therein referred to, or of its contents; and parol evidence is admissible for the purpose of identifying a plat offered in evidence as the one referred to in the deed.

ID.—QUIETING TITLE—EVIDENCE—EXISTENCE OF MAP—PROOF OF IDENTITY—REFERENCES IN CHAIN OF TITLE—CONVEYANCES FROM DEFENDANT—ADMISSION.—In an action to quiet title to land, where the deed under which the plaintiff claims title was made by one of the defendants, and refers to a map for a description of the property, such deed is, as against that defendant and his co-defendant claiming under him by a subsequent conveyance, sufficient proof of the fact that there was such a plat in existence at the date of the deed to the plaintiff; and further evidence, tending to show that the property was in fact surveyed prior to the execution of any of such deeds, and that the defendant who was the grantor of the plaintiff had himself, some two years thereafter, produced the map offered in evidence as the plat of the tract, sufficiently identifies the map as the one mentioned in the deed, and entitles it to be admitted in evidence on behalf of the plaintiff.

ID.—MAP OF ADDITION TO TOWN—CERTAINTY—ABSENCE OF FIELD-NOTES OR DESIGNATION—REFERENCE TO NATURAL MONUMENTS—LOCATION OF LAND.—Where a map of an addition to a town, though unaccompanied by field-notes, and having no signs or letters to indicate the different points of the compass, or any express designation of it as the map of any particular place, yet shows upon its face streets and alleys, and blocks subdivided into lots, and the relative location of a country road and a river, naming many of the streets and numbering the blocks, it cannot be said, as a matter of law, that the map is upon its face void for uncertainty, or that it would be impossible to locate

upon the ground a block of land, described in a deed by number, and as bounded on one side by one of the streets named in the map.

1A. — IDENTITY OF BLOCK — EVIDENCE. — Whether a block of land referred to in a deed is capable of being identified by reference to a map of an addition to the town is a question of fact, upon which the evidence of persons acquainted with the town, and what is known as such addition thereto, and the different streets or other objects shown on the map, is admissible.

1D. — METES AND BOUNDS OF BLOCK — FINDING AGAINST EVIDENCE. — Where the plaintiff claims under a deed of town lots, which does not describe the lots by metes and bounds, but refers to them only as constituting a block designated on the map of an addition to the town, and though introducing and identifying the map, introduces no evidence showing that the land could be properly located and described by specific metes and bounds with the aid of the map, a finding and judgment that the plaintiff is the owner of land described by specific metes and bounds is against the evidence.

1D. — CONSTRUCTION OF PLEADINGS — ISSUES — DENIAL OF OWNERSHIP — FAILURE TO DENY SPECIFIC BOUNDARIES RECITED — PROOF OF BOUNDARIES. — Where the complaint in an action to quiet title, after alleging the plaintiff's ownership of the land as marked on a plat, proceeds by way of recital to state that the land is particularly described according to certain specific metes and bounds, and the answer, without joining special issue as to the boundaries, denies the ownership by the plaintiff of the land described in the complaint, or any part thereof, the fact is not thereby admitted that the land is correctly described by the metes and bounds specified in the complaint, but the plaintiff must prove that fact, and in the absence of any evidence to prove them, a judgment quieting the title to the land described by such specific boundaries will be reversed upon appeal.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Brown & Daggett, and *Daggett & Adams*, for Appellants.

The description in the deed was so uncertain that the land sought to be conveyed could not be identified, and therefore the deed is void. (*Caldwell v. Center*, 30 Cal. 542; 89 Am. Dec. 131.)

N. O. Bradley, and *G. E. Lawrence*, for Respondent.

The description in the deed was sufficient, as the property could be identified with reasonable certainty, either with or without the aid of extrinsic evidence.

(*Stanley v. Green*, 12 Cal. 162; *Smiley v. Fries*, 104 Ill. 418.) The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. (*Peck v. Mallams*, 10 N. Y. 532; *Aguirre v. Alexander*, 58 Cal. 38.) The court will effectuate the lawful purpose of deeds and other instruments, if this can be done consistently with the principles and rules of law applicable. (*Edwards v. Bowden*, 99 N. C. 80; 6 Am. St. Rep. 487; *Nixon v. Porter*, 34 Miss. 697; 69 Am. Dec. 408; *Pursley v. Hays*, 22 Iowa, 11; 92 Am. Dec. 350; Code Civ. Proc., sec. 2077; *Penry v. Richards*, 52 Cal. 497. See *Colcord v. Alexander*, 67 Ill. 581.)

DE HAVEN, J. — Action to quiet title. The plaintiff recovered judgment in the superior court, and the defendants appeal. The plaintiff claims the land in controversy by virtue of a deed made to her by the defendant J. P. Murry, in June, 1871, in which the land conveyed to her is described as "situate, lying, and being in Porterville, county of Tulare, state of California, and bounded and particularly described as follows, to wit: on the north, two hundred and forty feet on Mill Street; on the east, one hundred and ten feet on a thirty-foot alley; on the south, two hundred and forty feet on an alley; on the west, one hundred and ten feet by a thirty-foot alley; and being all of lots Nos. one, two, three, and four, all of block No. eight, as per plat of Johnson & Murry's addition to the town of Porterville, Tulare County, California."

The defendant Martha Murry is the wife of plaintiff's grantor, and bases her claim to the land in dispute upon a deed made to her by her husband subsequently to the execution of the above-mentioned deed to plaintiff.

1. Plaintiff's deed is not upon its face void for uncertainty, as claimed by appellants, and parol evidence was properly admitted for the purpose of identifying the plat offered in evidence by her as the one referred to in such deed. It was incumbent upon plaintiff to produce, or in the event of its loss or destruction, give secondary

evidence of the contents of, the map referred to in her deed, as without such map there was no sufficient description of the land which the deed purported to convey (*Caldwell v. Center*, 30 Cal. 542; 89 Am. Dec. 131); and the court did not err in admitting in evidence the map offered by plaintiff, and claimed by her to be the one mentioned in such deed. It is true, no witness testified to having seen this particular map at any time prior to 1873, which was two years after the execution of plaintiff's deed, but still we think there was sufficient evidence before the court to justify it in finding that such plat was in existence at the date of that deed, and is the one to which reference is there made. The defendant J. P. Murry, in his deed to plaintiff, having described the land conveyed as block No. 8, as marked on the plat of Johnson & Murry's addition to the town of Porterville, such deed is, of itself, as against him and his co-defendant, who claims under him by a subsequent conveyance, sufficient proof of the fact that there was such a plat in existence when he made his deed to plaintiff. (*Patton v. Goldsborough*, 9 Serg. & R. 53.) There was also evidence given which tended to show that such an addition to the town of Porterville was in fact surveyed prior to 1871, and that defendant J. P. Murry himself produced this map some years afterwards as the plat of Johnson & Murry's addition to that town. We think these facts were amply sufficient to identify the map in question as the one mentioned in the deed, and entitled it to be admitted in evidence.

2. It is claimed by appellant that the map is upon its face void for uncertainty, and that it furnishes no starting-point or *data* from which a surveyor or any other person could locate the particular lots or block described in the deed, and that the court should have so held, as a matter of law, and excluded it as evidence. We do not think the court committed any error in overruling this objection of appellant. It is true that no field-notes accompanied it, nor are there upon it any signs or letters to indicate the different points of the compass or

any express designation of it as the map of any particular place. But there is shown upon its face streets and alleys, and blocks subdivided into lots, a county road and a river. Many of the streets are named, and the blocks are numbered, and it may be that persons acquainted with the locality of which it is claimed to be a map would at once recognize it as such. It certainly cannot be said, as a matter of law, that they could not, or that it would be impossible for one familiar with the town of Porterville and Johnson & Murry's addition thereto to locate upon the ground the block of land described in plaintiff's deed, with reference to the streets marked on this plat; and this being so, the map is not void upon its face. Whether the block in question is capable of being thus identified is a pure question of fact, and upon this point the oral evidence of persons who are acquainted with the town of Porterville, and what is known as Johnson & Murry's addition thereto, and with the different streets or other objects shown on the map, is admissible. If the land which plaintiff's deed purported to convey can be thus identified with the aid of the map referred to, the map is sufficiently definite, and the deed is not void for insufficiency in its description of the same.

3. The court found that plaintiff is the owner of block 8 of Johnson & Murry's addition to the town of Porterville, and that it is more particularly described as "commencing at a point on the south boundary line of Mill Street, in said town of Porterville, thirty feet east of the northeast corner of lot five, in block twenty, thence running easterly along said boundary line of Mill Street two hundred and forty feet; thence southerly at right angles one hundred and ten feet; thence westerly at right angles two hundred and forty feet; thence northerly one hundred and ten feet to the place of beginning"; and thereupon entered a judgment quieting the title of plaintiff to the land thus described. The appellants contend that this finding is against the evidence, and it seems to us that in so far as it states that

plaintiff is the owner of the land therein particularly described by metes and bounds, this contention of appellants must be upheld. The evidence before the court would support a finding and judgment to the effect that plaintiff is the owner of block 8, as marked on the plat of Johnson & Murry's addition to the town of Porterville; but there is nothing in the record before us which tends in any degree to show that this block would fall within the specific metes and bounds mentioned in the findings and judgment of the court below. If the plaintiff desired that the judgment quieting her title to the land in controversy should give a more definite description of its boundaries than is contained in the deed under which she claims, she should have introduced evidence showing that the land, which is simply referred to in that deed as a block, could also be properly described by the specific metes and bounds given in the decree. It may be that this can be shown by witnesses who know its location; but in the absence of all evidence upon the point, the court was not justified in finding that the land which it describes in the decree by specific metes and bounds is the block 8 conveyed by plaintiff's deed.

4. The plaintiff contends, however, that under the pleadings the fact is admitted that block 8, of Johnson & Murry's addition to the town of Porterville, is also correctly described by the specific metes and bounds given in the judgment of the court, and that for this reason she was not required to prove the fact. We do not so construe the pleadings. The complaint, after alleging plaintiff's ownership of block 8, as marked on the plat of Johnson & Murry's addition to the town of Porterville, proceeds by way of recital to state that said block is particularly described according to certain specific metes and bounds, which are the same as those mentioned by the court below in its findings and judgment. The answer, without taking any special issue with the recital contained in the complaint as to the boundaries of the block claimed by plaintiff, simply

denies that plaintiff is the owner of the land described in the complaint, or any part thereof. This was all defendants were required to do in order to throw upon plaintiff the burden of proving that she was the owner of the land mentioned in the complaint. It was unnecessary to particularly traverse the recital in the complaint as to the boundaries of the land claimed by plaintiff. The material allegation of the complaint is that which asserts plaintiff's *ownership* of the land described, and when this alleged fact was put in issue, as it was by the answer, the plaintiff was not entitled to a decree quieting her title to such land, no matter how it might be described, without proof that she had title to it, and the production of a deed which only described the land conveyed as a certain block, with reference to a plat, did not itself, in connection with the plat which was given in evidence upon the trial, show that such block might also be just as correctly described by the specific boundaries contained in the decree, and that therefore the land within such specific boundaries was conveyed by such deed.

Judgment reversed, and cause remanded for a new trial.

HARRISON, J., GAROUTTE, J., PATERSON, J., and BEATTY, C. J., concurred.

SHARPSTEIN, J., dissented.

McFARLAND, J. — I dissent, and adhere to the former opinion.

The following is the opinion above referred to by Mr. Justice McFarland, rendered in Bank on the 12th of September, 1890:—

The COURT. — This is a suit to quiet title to a parcel of land described in the complaint as follows: "Situate in the county of Tulare, state of California, described as follows, to wit: On the north, two hundred and forty feet on Mill Street; on the east, one hundred and ten feet on a thirty-foot alley: on the south, two hundred

and forty feet on an alley; on the west, one hundred and ten feet by a thirty-foot alley; and being all of lots Nos. one, two, three, and four, all of block No. eight, as per plat of Johnson & Murry's addition of the town of Porterville; said land being described, with reference to plats of the town of Porterville now on file in the recorder's office of said Tulare County, as commencing at a point on the south boundary of Mill Street thirty feet east of the northeast corner of lot five, in block twenty, of the old town of Porterville; thence running easterly along said boundary line two hundred and forty feet; thence southerly at right angles one hundred and ten feet; thence westerly at right angles two hundred and forty feet; thence northerly to the point of beginning,—lying and being in the southwest quarter of section twenty-five, township twenty-one south, range twenty-seven east, M. D. M." The plaintiff had judgment in the superior court, and the defendants appeal.

1. The superior court did not err in overruling the demurrer to the complaint. The two descriptions of the land therein contained are not inconsistent with each other, and, together, are sufficient to identify the land by reference to the recorded plats of the town of Porterville, if there are such plats agreeing with each other and conforming to such description in the delineation of Mill Street, block 20, and the lots in question.

2. The court did not err in admitting in evidence plaintiff's deed, exhibit No. 1. The plaintiff in this action is the grantee of the defendant J. P. Murry, whose wife and co-defendant is his subsequent grantee, The deed, exhibit No. 1, offered in evidence by the plaintiff, was the defendants' deed of the premises in controversy, dated and acknowledged June 20, 1871, and containing the following description of the premises conveyed: "All those certain lots, pieces, or parcels of land situate, lying, and being in the town of Porterville, county of Tulare, state of California, and bounded and particularly described as follows, to wit: On the north, two hundred and forty (240) feet on Mill Street;

on the east, one hundred and ten (110) feet on a thirty (30) foot alley; on the south, two hundred and forty (240) feet on an alley; on the west, one hundred and ten (110) feet by a thirty (30) foot alley; and being all of lots Nos. one (1), two (2), three (3), and four (4), all of block No. eight (8), as per plat of Johnson & Murry's addition to the town of Porterville; being all of said block No. eight (8) in said addition to Porterville, Tulare County, California." The objection to this deed was, that it described nothing; but as counsel offered to follow it up with a plat of Johnson & Murry's addition, the objection was properly overruled.

3. The court did not err in admitting the plat, exhibit No. 2. It is true that this plat contained nothing in itself by which it could be identified or located. But the defendant, by his deed of June 20, 1871, admitted that there was then existing a plat of Johnson & Murry's addition, and evidence was offered by the plaintiff that as early as 1873 the defendant had this plat, exhibit No. 2, on the ground, and that it was exhibited as the plat of Johnson & Murry's addition. It seems never to have been recorded, and there may be some doubt as to whether it is the same plat with reference to which the deed was made; but the evidence offered in connection with it was sufficient to authorize its admission in evidence. By his deed, the defendant admitted that there was a plat of Johnson & Murry's addition, and within two years of that admission he is shown to be in possession of this plat, and exhibiting it as the plat of the addition. As against him, and those claiming under him, and in favor of his grantee, this is certainly sufficient, *prima facie*, to identify the plat. If there was another and different plat to which the deed in fact referred, he was called upon to show it. He made no such attempt, but rested upon the denial that he had ever made the deed, or any plat. It was shown, however, that he had made a prior deed for other lots on Mill Street, and in the same addition; and the finding

of the court as to the genuineness and due execution of the deed is conclusive against him.

4. Most of the remaining objections relied on by appellants relate to the admission of oral testimony as to the actual location of the lots delineated on the plat, exhibit 2. This plat shows various things on its face,—streets and alleys; blocks subdivided into lots; a county road; Mill Street, Main Street, Water Street, and other streets; a river; plats marked as D. Murphey's land, J. P. Murry's land, Johnson & Keeney, etc. It is certainly not impossible that witnesses acquainted with these features of the town and vicinity of Porterville might locate the addition with reference to the main town of Porterville, and testimony for that purpose was clearly admissible. It was not necessary for the plaintiff to show that there had been an actual survey of the streets, lots, and blocks of the addition, and stakes set out on the ground. Her conveyance was of lots delineated on a plat; and if she could prove a plat showing lots and streets corresponding with the description in the deed, and other things by which, with the aid of oral testimony, the lots could be located on the ground, this was competent and sufficient as against her grantor. We find no error in the record.

[No. 18635. In Bank. — June 17, 1892.]

**VANDERHURST, SANBORN, & CO., RESPONDENTS, v.
GEORGE W. DE WITT, DEFENDANT, AND WILLIAM
DE WITT, APPELLANT.**

PARTNERSHIP — FARMING AND THRASHING BUSINESS — SHARING NET PROFITS AS COMPENSATION. — In order to constitute a partnership in the farming and thrashing business, there must be an agreement to carry on the business together and divide the profits, and the fact that one of the agreeing parties is to receive one-half of the net profits of the business will not make him a partner therein, if it is agreed that he is to receive the same only as compensation for the use of personal property let by

him to be used by the other party in the prosecution of such business in his own name, and solely on his own account.

10. — EVIDENCE OF PARTNERSHIP — DECLARATION OF COPARTNER. — Upon the trial of an issue joined as to the fact of partnership, the declaration of an alleged partner, made in the absence of the party denying the partnership, cannot, as against the absent one, be used to establish the fact of partnership.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

H. V. Morehouse, and *S. F. Geil*, for Appellant.

There was no allegation of partnership in the complaint, and therefore no proof of partnership was admissible. (*Freeman v. Campbell*, 55 Cal. 197; *McCord v. Seale*, 56 Cal. 264; *Cotes v. Campbell*, 3 Cal. 192; *Stearns v. Martin*, 4 Cal. 228; *Morrison v. Bradley*, 5 Cal. 503; *Weinrich v. Johnson*, 78 Cal. 254; *Shain v. Forbes*, 82 Cal. 577.) The declarations of defendant George W. De Witt that he was a partner of William De Witt were inadmissible against William De Witt. (*Smith v. Wagaman*, 58 Iowa, 11; *Scott v. Dansby*, 12 Ala. 714; *Tuttle v. Cooper*, 5 Pick. 414; *Uhler v. Browning*, 29 N. J. L. 79; *Conley v. Jennings*, 22 Ill. App. 547; 9 Am. & Eng. Ency. of Law, 342; 1 Parsons on Notes and Bills, 126; *Bundy v. Bruce*, 61 Vt. 619; Code Civ. Proc., sec. 1848.) Before a partner can be held for the act of his co-partner, it must be shown that the credit was given in faith of the partnership. (Civ. Code, sec. 2431; *Denithorne v. Hook*, 112 Pa. St. 240; *Brown v. Rains*, 53 Iowa, 81; *Thompson v. Bank*, 111 U. S. 529; 1 Cooley on Partnership, 19; *Dickinson v. Valpy*, 10 Barn. & C. 140; *Wood v. Pennell*, 51 Me. 52; *Vice v. Anson*, 7 Barn. & C. 409; *Wright v. Powell*, 8 Ala. 560; *Pringle v. Leverich*, 48 N. Y. Sup. Ct. 90; *Carter v. Whalley*, 1 Barn. & Adol. 11; *Vincent v. Beveridge*, 3 McAr. 597; 36 Am. Rep. 113; *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173.) But admitting for the sake of argument that the defendants were part-

ners in a farming business, yet such a partnership is not commercial and therefore a note executed by one member of a farming partnership does not bind the firm, unless it be shown that the partner executing the note had full authority from the other partner so to do, and the burden of showing the authority is upon the plaintiffs. (*Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173; Randolph on Commercial Paper, sec. 405; *McCrary v. Slaughter*, 58 Ala. 230; *Cooper v. Frierson*, 48 Miss. 300; 2 Lawson's Rights and Remedies, sec. 646; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757.) There was no holding out by defendant William De Witt, and before he could be held liable to plaintiffs upon the note in question, there must be proof of such holding out by William De Witt that he was a partner, or proof that he was so held out with his knowledge, and that plaintiffs, at the time they sold the goods, knew of such holding out, and relied upon the same, and gave the credit upon the faith of such holding out to them, personally; and a holding out to the world is not sufficient. It must be to the plaintiffs. (2 Lawson's Rights and Remedies, sec. 642; *Bowie v. Maddox*, 20 Ga. 285; 74 Am. Dec. 61; *Pringle v. Leverich*, 48 N. Y. Sup. Ct. 90; *Carter v. Whalley*, 1 Barn. & Adol. 11; Lindley on Partnership, 2d Am. ed., sec. 43.) As the proof is positive that plaintiffs did not know of any holding out by the defendant William De Witt, there is an entire absence of proof of any holding out by the defendant William De Witt, bringing the case within the rules laid down by 1 Lindley on Partnership, 2d Am. ed., 43. (*Thompson v. Bank*, 111 U. S. 529; *Carter v. Whalley*, 1 Barn. & Adol. 11; *Pringle v. Leverich*, 48 N. Y. Sup. Ct. 90; *Vinson v. Beveridge*, 3 McAr. 597; 36 Am. Rep. 113; *Hathlo v. Mayer*, 102 Mo. 93.) Where the agreement is, that one person shall furnish the land and the other shall occupy and cultivate it, dividing the crops in a certain proportion, the relation is not that of partnership. (*Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *Holloway v. Brinkley*, 42 Ga. 226; *Smith v. Summerlin*, 48 Ga. 425; *Christian v. Crocker*,

25 Ark. 330; 99 Am. Dec. 223.) So here there is no mistake as to what the agreement was, and no dispute as to its terms, and defendant William De Witt was not to share either in the losses or the profits. He was simply to have a certain part of the net proceeds as payment for the use of his property. (See *Burnett v. Snyder*, 81 N. Y. 550; *Ford v. Smith*, 27 Wis. 261; *Ruddick v. Otis*, 33 Iowa, 402; *Beckwith v. Talbot*, 2 Col. 639; *Dale v. Pierce*, 85 Pa. St. 474; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Iliff v. Brazill*, 27 Iowa, 131; 99 Am. Dec. 645; *Day v. Stevens*, 88 N. C. 83; 43 Am. Rep. 732; *Irwin v. Nashville etc. R. R. Co.*, 92 Ill. 103; 34 Am. Rep. 208; *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267; *Austin v. Thomson*, 45 N. H. 113; *Stoallings v. Baker*, 15 Mo. 481; *Smith v. Knight*, 71 Ill. 148; 22 Am. Rep. 94; *Lintner v. Millikin*, 47 Ill. 178.) When a man is only interested in the profits of a business, he is not a partner. (*Cassidy v. Hall*, 97 N. Y. 159; *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267; *Curry v. Fowler*, 87 N. Y. 33; 41 Am. Rep. 343; *Hanna v. Flint*, 14 Cal. 73; *Wheeler v. Farmer*, 38 Cal. 203; *Robinson v. Haas*, 40 Cal. 474; *Smith v. Moynihan*, 44 Cal. 53; *Quakenbush v. Sawyer*, 54 Cal. 439; *Nicholaus v. Thielges*, 50 Wis. 491; *Edson v. Gates*, 44 Mich. 253; *Beecher v. Bush*, 45 Mich. 188; *Thayer v. Augustine*, 55 Mich. 187; *Colwell v. Britton*, 59 Mich. 350; *Williams v. Fletcher*, 129 Ill. 356; *Wilcox v. Matthews*, 44 Mich. 192; *Day v. Stevens*, 88 N. C. 83; 43 Am. Rep. 732.)

John K. Alexander, and *Dorn & Parker*, for Respondent.

A partnership is an association of two or more persons for the purpose of carrying on business together and dividing the profits between them. (Civ. Code. sec. 2395.) An agreement to divide the profits of a business implies an agreement for a corresponding division of losses. (Civ. Code, sec. 2404.) Where two or more persons unite in business, one contributing money and the other labor, the profits to be divided between them, such union is a partnership. He who shares in the advan-

tages must also share in the disadvantages. (Watson on Partnership, 15, 16; *Miller v. Hughes*, 1 A. K. Marsh. 181; 10 Am. Dec. 719; *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293; *Beauregard v. Case*, 91 U. S. 134.) William De Witt was not only a partner in fact, but was with his consent held out as a partner, and is therefore liable as a partner. (Parsons on Partnership, 2d ed., 63, 140; *Osborn v. Brennan*, 2 Nott & McC. 427; 10 Am. Dec. 614; Lindley on Partnership, 42, 43.) As the goods purchased were applied to the use of the partnership, the firm is liable. (Parsons on Partnership, 2d ed., 144.) The signature of the firm name by the partner binds the firm, if the proceeds thereof are received and held by the firm. (1 Parsons on Notes and Bills, 124; *Richardson v. French*, 4 Met. 577, and cases cited.) As in this case George De Witt was to manage the business, and the expenses were to be paid by him out of the proceeds of the business, and the net profits to be equally divided, he was a partner of William De Witt, and, as such, the agent of the firm. (*Quinn v. Quinn*, 81 Cal. 14.)

DE HAVEN, J. — Action upon a promissory note. The trial was by a jury, and resulted in a verdict and judgment in favor of plaintiffs, and the defendant William De Witt appeals.

The note sued upon is signed "Geo. & Wm. De Witt," and was in fact so signed and delivered to plaintiffs by the defendant George W. De Witt. The appellant alleges in his answer that the note was executed without his knowledge and authority. The evidence upon the trial tended to show that the note was made by George W. De Witt in settlement of an account which the plaintiffs had against him for merchandise furnished to and used by him in carrying on a certain farming and thrashing business, in which business the respondents claim that the appellant and the said George W. De Witt were in fact partners. The evidence further shows that at the time the goods and merchandise were sold, they were charged personally to George W. De Witt, and appellant

was not at the time held out to respondents as a partner in the business referred to, nor did they know of the existence of the partnership now alleged.

1. It will be seen from the foregoing statement that the right of the respondents to maintain this action against the appellant really turns upon the question whether he was in fact a partner of the defendant George W. De Witt in the business referred to, and upon this point the court instructed the jury, in substance, that in order to constitute such partnership, there must have been an agreement between the appellant and his co-defendant to carry on the business together, and to divide the profits between them, and that the fact that appellant was to receive one half of the net profits of the farming and thrashing business would not make him a partner therein, if the understanding and agreement between the parties was, that he was to receive the same only as a compensation for the use of certain personal property let by him to George W. De Witt, to be used by said George W. De Witt in the prosecution of that business solely on his own account.

The evidence upon the part of the appellant tended to show the facts referred to in this instruction, and the instruction was a correct statement of the law upon the subject to which it relates. (*Kellogg v. Farrell*, 88 Mo. 594; *McDonald v. Matney*, 82 Mo. 358; *Lindley on Partnership*, 2d ed., marg. p. 35.) But upon the trial the court, against the objection and exception of the appellant, admitted evidence of the declarations of the defendant George W. De Witt, not made in the presence of the appellant, to the effect that he and the appellant were such partners. There was error in the admission of this evidence. It is well settled that upon such an issue the declaration of an alleged partner, made in the absence of the other, cannot, as against the absent one, be used to establish the fact of partnership. (*Cowan v. Kinney*, 33 Ohio St. 422; *Flanagin v. Champion*, 2 N. J. Eq. 54; *Dutton v. Woodman*, 9 Cush. 255; 57 Am. Dec. 46; *Whitney*

v. *Ferris*, 10 Johns. 66; *McPherson v. Rathbone*, 7 Wend. 216; *Butte Hardware Co. v. Wallace*, 59 Conn. 336.)

In *Dutton v. Woodman*, 9 Cush. 255, 57 Am. Dec. 46, the rule which excludes such declarations, and the self-evident reason upon which it is based, is thus stated by Bigelow, J.: "The authority of Thurston and I. F. Woodman to bind E. W. Woodman by their statements and declarations depend entirely upon the existence of the copartnership. Until that was proved, E. W. Woodman was not shown to have had any connection with either of them, and as that was the point in controversy before the jury to be determined by their verdict, evidence which would be admissible only upon the assumption of the existence of the copartnership was clearly incompetent, when offered to prove the fact upon which its competency depended."

This evidence being incompetent, and relating, as it did, to a material question in the case, the judgment and the order denying appellant's motion for a new trial must be reversed.

Judgment and order reversed.

SHARPSTEIN, J., PATERSON, J., McFARLAND, J., HARRISON, J., and GAROUTTE, J., concurred.

Rehearing denied.

[No. 14783. In Bank.—June 17, 1892.]

FREDERICK W. KOPP, APPELLANT, v. ROBERT GUNTHER, RESPONDENT.

DEED OF TRUST — RESCISSION — REVOCATION OF WILL. — A complaint in an action brought to have it decreed that a conveyance of lands by the plaintiff to the defendant created a mere naked legal trust, and to compel the defendant to convey the lands to the plaintiff, alleging that the property was conveyed in trust, and that at the same time the defendant executed a written instrument, which, after reciting that the property was conveyed in trust, contains an acceptance of the trust and an agreement to carry out the same according to a declaration of trust set forth in plain-

tiff's will, executed contemporaneously therewith, and which further alleges that the deed was executed solely for the purpose of securing the defendant for small amounts of money to be loaned to the plaintiff by the defendant, and as a part of his last will, and further avers that the plaintiff has revoked his will and the naked trust, if any, created by the conveyance, and has offered to repay the sums advanced by defendant, but which avers neither undue influence, fraud, or any other of the ordinary grounds for avoiding conveyances, states no cause of action.

ID. — VOLUNTARY TRUST NOT REVOCABLE — WANT OF CONSIDERATION. — A voluntary deed of trust passing a present interest in fee to the trustee, with full power to control, encumber, and sell the property without reserving a power of revocation, is irrevocable, and a want of consideration therefor is immaterial.

ID. — DECLARATION OF TRUST IN WILL — REVOCATION OF WILL — SEPARATE DEED OF TRUST — REFERENCE TO WILL. — A declaration of trust in a will as to property conveyed to a trustee by an absolute conveyance in trust, which is no part of the will, is not revoked by the revocation of the will, where the property conveyed is expressly excepted from the estate disposed of by the will, and the declaration of trust contained in the will is referred to in the deed of trust for the purpose of showing the nature of the trust.

ID. — MISTAKE OF LAW — TESTAMENTARY DISPOSITION — RELIEF IN EQUITY. — A mere mistake of law on the part of the grantor of a deed of trust as to the nature and effect of the instrument, supposing it to be a mere testamentary disposition of his property, remaining within his control, is not ground for relief in equity, especially where it appears that he intended to put the property beyond the reach of an unfavorable judgment.

APPEAL from a judgment of the Superior Court of Butte County.

The facts are stated in the opinion of the court.

Buck & Cutler, for Appellant.

The three written instruments were all executed at the same time, and constituted but one transaction. By their very terms, the deed and written acknowledgment of defendant were incorporated into plaintiff's will, and formed but an integral part thereof. (*Newton v. Seamens*, 130 Mass. 91-97; 1 Redfield on Wills, 261-268, 435; *Westcott v. Cady*, 5 Johns. Ch. 334; 9 Am. Dec. 306; Schouler on Wills, secs. 280-282; *Seamens v. Butler*, 8 Port. 380; *Epperson v. Mills*, 19 Tex. 67; *Ferguson v. Ferguson*, 27 Tex. 340-344; *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620, 621; *Tonnele v. Hall*, 4 N. Y. 140; *Brown v. Clark*, 77 N. Y. 377.) The three papers (will,

deed, and acknowledgment of trust) must be read together. In this case it takes them all to complete the transaction. (Civ. Code, sec. 1642, and cases cited in notes.) Taking the papers and reading them together, the whole constitute a disposition of testator's property, to take effect after his death; and the whole simply constitutes a will. (Cases above cited, and *Leaver v. Gauss*, 62 Iowa, 314; *Singleton v. Bremar*, 4 McCord, 12; 17 Am. Dec. 699; Schouler on Wills, sec. 272; *Guaranty etc. v. Green etc.*, 139 U. S. 141; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 242; *Robertson v. Dunn*, 2 Murph. 133; 5 Am. Dec. 525.) It is the established law with reference to deeds of a testamentary character, that they can be revoked by the party executing them at any time during his life. They stand on no higher plane than the ordinary will while the testator is living; have precisely the same effect,—no less and no greater. No one has a vested interest in them, and they are of no force. (*Watkins v. Dean*, 10 Yerg. 320; 31 Am. Dec. 583.) The deed to defendant and the written acknowledgment by him of the trust created by the will constitute him a mere agent for Kopp. He is given a mere naked power, not coupled with any interest. It is therefore revocable at the pleasure of Kopp. (Civ. Code, sec. 2356; *Gilmore v. Whitesides*, Dud. Eq. 14; 31 Am. Dec. 568.) The clause in the will stating that the property conveyed in trust formed no part of the estate therein disposed of, and as not to be administered upon in probate, is controlled by the specific directions in the will. Where there are specific provisions in an instrument, they will always control general provisions. (*Bank v. Roche*, 93 N. Y. 374; *Bock v. Perkins*, 139 U. S. 634.) If the clause relied upon by defendant was actually meant to permanently divest plaintiff of all right and title to the property, it would be an attempt to abdicate a legal right appertaining to wills,—that is, the power to revoke at pleasure. Plaintiff could do no act which would deprive him of his legal power to revoke his will at pleasure. This is obvious. (See Schouler on Wills, sec. 10, and note; *Wait*

v. *Belding*, 24 Pick. 136; and see *Guaranty etc. v. Green etc.*, 139 U. S. 137-142; *Rick's Appeal*, 105 Pa. St. 528.) But whatever view be taken of the trinity of instruments set forth in the complaint, plaintiff is entitled to the relief prayed for, upon the plainest principles of equity. (*Miskey's Appeal*, 107 Pa. St. 621, 629-633; *Bristor v. Tasker*, 135 Pa. St. 110, and cases therein cited; *Russell's Appeal*, 75 Pa. St. 279, 280; *McKinnon v. McKinnon*, 46 Fed. Rep. 713; *Nash v. Burchard*, 87 Mich. 85; *Brison v. Brison*, 75 Cal. 630; 7 Am. St. Rep. 189; *Rick's Appeal*, 105 Pa. St. 535, 536.)

Chamberlin & Wheeler, for Respondent.

The trust in question needs no consideration to support it, for the reason that it is a voluntary transfer and an executed contract. A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another. (Civ. Code, sec. 2216.) The trust in question is one of the active trusts expressly recognized by law. (Civ. Code, sec. 857; 2 Pomeroy's Eq. Jur., sec. 565.) The instrument of transfer from Kopp to Gunther was a grant, bargain, and sale deed, and duly and absolutely vested the fee-simple in the trustee. (Civ. Code, sec. 863.) A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general, except that a consideration is not necessary. (Civ. Code, sec. 1040.) The transfer here was not only a voluntary transfer, and therefore without need of consideration, but was perfectly valid and binding, because of being a perfectly created and executed trust, which could not be revoked. (1 Perry on Trusts, sec. 98; *Estate of Webb*, 49 Cal. 543; *Stone v. Hackett*, 12 Gray, 227; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505; *Viney v. Abbott*, 109 Mass. 300; *Falk v. Turner*, 101 Mass. 494; *Keys v. Carleton*, 141 Mass. 45; 55 Am. Rep. 446; *Light v. Scott*, 88 Ill. 239.) A trust is extinguished only by the entire fulfillment of its object, or by such object becoming impossible or unlawful. (Civ. Code, sec. 2279; *Scrivner v. Dietz*, 84 Cal.

297.) A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and the beneficiary, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued. (Civ. Code, sec. 2280; *Hellman v. McWilliams*, 70 Cal. 449; *Scrivner v. Dietz*, 84 Cal. 297; *Hildreth v. Elliott*, 8 Pick. 296.) There was no sufficient allegation of a mistake. A simple mistake by a party as to the legal effect of an instrument which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. (2 Pomeroy's Eq. Jur., sec. 843; *Gross v. Parrott*, 16 Cal. 143; *Guy v. Du Uprey*, 16 Cal. 198; 76 Am. Dec. 518.) From the consequences of this class of mistakes, courts of equity seldom relieve; indeed, the weight of authority is, that the mistake, unless accompanied by special circumstances, such as misrepresentation, undue influence, or fraud, constitutes no ground for relief. (*Goodenow v. Ewer*, 16 Cal. 471; 76 Am. Dec. 540; *Kenyon v. Welty*, 20 Cal. 640; 81 Am. Dec. 137.) If the language of a deed is the language intended to be used by the grantor, his mistake as to the legal effect of the language used will not afford him any ground for relief in equity. (*Burt v. Wilson*, 28 Cal. 637; 87 Am. Dec. 142; *Bucknall v. Story*, 46 Cal. 589; 13 Am. Rep. 220; *King v. La Grange*, 50 Cal. 332; *Douglas v. Gould*, 52 Cal. 656.) Misapprehension as to the legal effect of an arrangement voluntarily made is no ground for relief. (*Parsons v. Fairbanks*, 22 Cal. 348.) Every man is charged with a knowledge of the law, at his peril (*Christy v. Sullivan*, 50 Cal. 337; 19 Am. Rep. 655.) The misapprehension averred in the complaint does not fall within the class of mistakes of law that are entitled to be relieved against. (Civ. Code, secs. 1576, 1577.) The allegations of the complaint are directly contrary to the plain legal effect of the deed. In order to recover under the complaint, plaintiff would have to annul and abrogate his deliberate act in making the conveyance, on the allegation

that he did not intend to do what he deliberately did do. (*Annis v. Wilson*, 15 Col. 236.) An instrument conveying property, to take effect, as far as regards handing over of property at my death, is a deed passing a present interest to be enjoyed *in futuro*. (*Wall v. Wall*, 30 Miss. 91.) If it appears doubtful from the face of an instrument whether the person executing it intended it to operate as a deed or as a will, it is proper to ascertain the intention of such person by evidence showing that such person really considered it. Whether an instrument is a deed or a will depends on the intention of the maker. (*Robertson v. Dunn*, 2 Murph. 183; 5 Am. Dec. 525.) Instruments passing property in the donor's lifetime, although of alleged testamentary character, being not absolutely a will, must be a deed; there is no middle ground. (*Hileman v. Bouslaugh*, 15 Pa. St. 344; 51 Am. Dec. 474.) When it is sought to have an informal paper declared a will, it must be proved that it is the act of the deceased, and that it was executed *animo testandi*. (*Anderson v. Pryor*, 18 Miss. 620; *Frew v. Clarke*, 80 Pa. St. 170.) It is the *animus testandi*, in general, which makes an instrument a will, or *vice versa*. (*Lyles v. Lyles*, 2 Nott & McC. 531.) And it is no longer an open question that an instrument cannot be allowed as a will if, at the time of its execution, the deceased did not intend to make his will, nor knew that he was making it. (*Swett v. Boardman*, 1 Mass. 258; 2 Am. Dec. 16; *Combs v. Jolly*, 3 N. J. Eq. 625.) A will is to be construed according to the intention of the testator. (*Colton v. Colton*, 127 U.S. 309; *Kidwell v. Brummagim*, 32 Cal. 436; *Estate of Woods*, 36 Cal. 75; *Williams v. MacDougall*, 39 Cal. 80; *Estate of Radovich*, 54 Cal. 540; *In re Whitcomb*, 86 Cal. 272.) The intention of the testator is to be ascertained from the will itself. (Civ. Code, sec. 1318; *Davis v. Davis*, L. R. 15 P. D. 109.) The fundamental and cardinal rule in the construction of wills is, that the intention of the testator must be carried into effect when not against the established rules of law. (Civ. Code, sec. 1317.) To give to the will under consideration the con-

struction contended for by appellant would not only utterly disregard the plain intention of Kopp as evinced by the clear language used, but it would be an unwarranted interpretation, in direct violation of the mandatory provisions of sections 1321 and 1325 of the Civil Code. And in construing a will no rule of construction will be allowed to defeat the plain intentions of the testator. (*Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 59; *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404; *Heath v. Hewitt*, 127 N. Y. 166.) An instrument conveying property, but showing on its face that the use thereof is reserved during the maker's lifetime, may be either a deed or will, the class to which it belongs being determinable upon all the circumstances surrounding the parties and attending its execution. A clause in such an instrument stating that it is intended in part to dispense with the necessity of administration on the maker's estate may be considered in determining whether the maker intended it to take effect during her life. The fact that the maker did not dispose of all her property is likewise admissible on the question of whether she intended the instrument as a will. (*Sharp v. Hall*, 86 Ala. 110.) If an instrument in writing passes a present interest in real estate, although the right to possession and enjoyment may not accrue until some time in the future, it is a deed or contract; but if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper. (*Reed v. Hazleton*, 37 Kan. 321; *Sperber v. Ballister*, 66 Ga. 317; *Turner v. Scott*, 51 Pa. St. 126; *Mitchell v. Mitchell*, 108 N. C. 542.) The declaration of trust was clearly not testamentary. It passed a present fee-simple title to the trustee, and gave at the same moment a right in each and all of the beneficiaries to compel the performance of the trust. (*Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376; Civ. Code. sec. 863; *Ward v. Waterman*, 85 Cal. 488; *Campton v. White*, 86 Mich. 33.) If the trustee in any manner violates his trust, as by refusing to pay the taxes, or by suffering the buildings or

premises to fall into decay, or by an attempted conveyance, etc., the beneficiary can legally prevent his so doing, and can compel the proper carrying out of the trust. (Civ. Code, sec. 863.) Should it be said that the grantee, Gunther, has no interest himself, but that he is merely the agent for the beneficiaries, and that therefore the instrument is testamentary, the answer is: 1. That he himself takes a valid subsisting interest in fee in the trust, and being also entitled to have the trust carried out and specifically performed after undertaking it and entering upon his duties, and being, in addition, entitled to his compensation as trustee (Civ. Code, secs. 863, 2274), which would in this instance be a lien upon and interest in the trust property. (*Glide v. Dwyer*, 83 Cal. 477.) 2. That in order to strip an instrument of its testamentary character, it is only necessary that some interest must pass from the grantor at the time the conveyance is made; there is no requisite demanding that such interest must pass or vest at such time in any particular person. Having actually passed and vested in the trustee, who has in his individual capacity an actual valid personal interest, aside from his legal title, the law is fully complied with and the conveyance is irrevocable. (*Robinson v. Schly*, 6 Ga. 527.) In determining whether an instrument be a deed or a will, it must be ascertained whether the maker intended to convey any estate or interest whatever to vest before his death upon the execution of the paper, or, upon the other hand, whether he intended that all the interest and estate should take effect only at his death. (*Gilman v. Mintin*, 42 Ala. 365; *Jordan v. Jordan*, 65 Ala. 301.) In the present case the trust was fully and completely created and executed, both as to the trustee and as to the beneficiaries. (Civ. Code, secs. 2221, 2222; *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 559.) It was an express active trust, the duties of the trustee beginning immediately upon the execution of the trust deed. (1 Pomeroy's Eq. Jur., sec. 991.) And upon its creation there was imposed upon Gunther a twofold fiduciary relation; he became

a trustee for both the trustor and the beneficiaries. (Civ. Code, secs. 2219-2258.) This being so, upon the creation of the trust, there arose in the beneficiaries a vested right to enforce the performance and carrying out of the trust. (Civ. Code, secs. 863, 2258; 1 Perry on Trusts, secs. 816, 816 a.) This vested right it was beyond the power of the settlor to revoke or impair, without the consent of all the beneficiaries. (Civ. Code, sec. 2280; *Hellman v. McWilliams*, 70 Cal. 449; *Scrivner v. Dietz*, 84 Cal. 297.)

MOFARLAND, J.—This action was brought to have it decreed that a certain conveyance of lands by plaintiff to defendant created a mere naked legal trust, and to compel defendant to convey said lands to plaintiff. Defendant interposed a general demurrer to the complaint, which was sustained; and plaintiff declining to amend, final judgment was rendered for defendant. Plaintiff appeals from the judgment.

The conveyance referred to is dated January 23, 1891, and is an ordinary grant, bargain and sale deed, by which, for a named consideration of five thousand dollars, the plaintiff conveys to the defendant, in fee-simple, certain lots of land in the city of Eureka. It was duly acknowledged and recorded. At the same time, defendant executed a written instrument, which, after reciting that plaintiff had conveyed said lots to defendant in trust, proceeds as follows: "I hereby accept such trust, and hereby agree to carry out the terms thereof as the same appear in that certain declaration of trust set forth and contained in the last will and testament of the said Kopp, this day made, which said declaration of trust is hereby referred to and made a part hereof."

On the same day, plaintiff made his will, in which, after providing for the expenses of his last sickness, funeral, etc., he gives all the residue of his estate to one Regine Wagner. The will then proceeds as follows: "Having this day made, executed, and delivered unto Robert Gunther a deed conveying to him lots one and eight in block thirty-six, and the southwest quarter of block ninety-four, in the city of Eureka, according to

the official map of said city, said property being conveyed to him in trust, to be held, managed, encumbered, or disposed of in accordance with certain directions by me given to him, the said Gunther,—now, in order to avoid any uncertainty in relation to said trust, I hereby declare said trust to be as follows, to wit: 1. That said Gunther is to hold and manage said real property from this date henceforth in such manner as he may deem best; and upon my death he is at once to pay, or cause to be paid, from out said trust property, the following amounts, to wit, to Catarina Kopp [and five other persons] the sum of one hundred dollars each; 2. To cause to be erected over my grave a tombstone, to cost about \$150; 3. Any money the said Gunther shall pay out for said property, either for taxes, insurance, or otherwise, and any and all sums of money he may advance or loan to me between this date and the time of my death, are to be considered a preferred charge on said lands; and the said Gunther is to first reimburse himself for such amounts so paid from said trust property; 4. Upon the payment of the foregoing, and such additional sums as the said Gunther may deem a reasonable compensation for his services as such trustee, he, the said Gunther, is to at once convey said property as follows, to-wit: Unto Regine Wagner the said lots one and eight of block thirty-six; and unto Augusta Wagner, the sister of the said Regine, the said southwest quarter of block ninety-four; 5. Should it be necessary or expedient to sell or encumber said property in order to carry out said trust, said trustee has full power so to do, it being left to his discretion to so act in relation thereto that the diminution in value suffered by said trust property by reason thereof will be borne proportionately by the respective shares of the said Regine and Augusta Wagner. I here expressly state that the said trust property so conveyed as aforesaid forms no portion of my estate herein by this my last will disposed of, nor is it my wish or desire that said trust property be administered upon in probate.”

The substantial averments of the complaint are these:

The plaintiff, at the time of the execution of these instruments, was advanced in years and in feeble health, and was "harassed by an unconscionable suit" brought against him by a woman who wanted damages for an alleged breach of promise of marriage. "Being oppressed by illness and anxiety about said suit," he sought the advice of defendant, in whom he had confidence, and under these circumstances, and "being thereto advised by defendant," he executed the said instruments. "In the execution of said instruments, plaintiff understood and believed that he was making a testamentary disposition of his property; and he did not understand thereby nor intend thereby to place said real estate nor any portion of his property beyond his control, or other disposition thereof; said deed expresses a consideration of five thousand dollars; no consideration was paid, and it was executed "solely for the purpose of securing defendant for small amounts of money to be loaned to plaintiff by defendant, and as a part of his last will as aforesaid." Since then, "said unconscionable suit for breach of promise of marriage has been tried, and judgment thereon was, on the fourteenth day of March, 1891, duly given and made in favor of this plaintiff (defendant in said action) for his costs." It is further averred that "plaintiff has revoked said will and every part thereof, and has also revoked the naked trust, if any, created by said conveyance." It is also averred that defendant had advanced to plaintiff about three hundred dollars; that plaintiff has offered to pay said sum, and is ready to pay any other indebtedness which may be found due defendant; has demanded a reconveyance and tendered to defendant a deed to be executed by him; but that defendant has refused to execute such deed, and claims to hold the legal title for the benefit of said Regine and Augusta Wagner.

The demurrer was properly sustained. The complaint contains no averments of undue influence, fraud, or any other of the ordinary grounds upon which the avoidance of solemn conveyance of property is usually based.

It goes upon the theory that the deed was part of the will, and that plaintiff, by revoking the latter, annulled the former. But this clearly was not so. The revocation of the will released from its operation all property which would have been devised or bequeathed thereby if the testator had died without making the revocation. But the plaintiff in the will did not devise, or attempt to devise, the property conveyed by the deed; on the contrary, the latter was expressly excepted from the will, in which it was expressly stated that "the said trust property so conveyed as aforesaid forms no portion of my estate herein by this my last will disposed of." It is true that the instrument in which the will was written also contained a declaration of trust, to which the acceptance of the trust by defendant referred; but the declaration of trust was as effective after the revocation of the will as before, and would have been equally effective if the will had never been valid as a will; that is, if for want of proper attestation, or from some other defect, it had never been legally executed. The deed is not part of the will, but the declaration of trust contained in it is referred to in the deed for the purpose of showing the nature of the trust. A present interest passed to defendant; he received the title in fee, with full power to control, to encumber, or to sell the property. It was a voluntary trust without power of revocation; and the averment of want of consideration is immaterial. (Code Civ. Proc., secs. 863, 1040, 2216.) The averment of a mistake of law does not bring the case within that extreme class of mistakes of law from which equity will relieve. (Civ. Code, sec. 1578; *Goodenow v. Ewer*, 16 Cal. 471; 76 Am. Dec. 540; *Kenyon v. Welty*, 20 Cal. 640; 81 Am. Dec. 137; *Burt v. Wilson*, 28 Cal. 638; 87 Am. Dec. 142.) Moreover, it is apparent upon the face of the complaint that plaintiff did exactly what he intended to do. It is also clear that one of the main purposes of the deed was to put plaintiff's property beyond the reach of an unfavorable judgment on the pending action for breach of marriage, — which, of

course, could not have been effected by a mere testamentary disposition of said property.

The judgment is affirmed.

GAROUTTE, J., SHARPSTEIN, J., PATERSON, J., HARRISON, J., and DE HAVEN, J., concurred.

Rehearing denied.

[No. 18288. Department One.—June 18, 1892.]

**THE PEOPLE EX REL. THE STATE BOARD OF
HARBOR COMMISSIONERS, RESPONDENT, v. H.
M. LA RUE ET AL., APPELLANTS.**

STATE HARBOR COMMISSIONERS — ACTION ON WHARFINGER'S BOND. — USE OF NAME OF PEOPLE — ATTORNEY-GENERAL. — Under section 2523 of the Political Code, providing that the board of state harbor commissioners may institute and prosecute to final judgment actions in the name of the people of the state for the collection of any money due, or that may become due, under the authority of article IX., part III., title VI., of the Political Code, the board has authority to use the name of the people without the relation of the attorney-general, in an action against the sureties of a wharfinger to recover moneys lost to the board by his delinquency.

Id. — REMOVAL OF WHARFINGER — CHANGE OF STATUTE. — The fact that the wharfinger was appointed in 1880, and removed from office in 1883, after the delinquency complained of had taken place, and that the action was commenced after a change was made in the statute, whereby the duties of the wharfinger were conferred upon another officer, called a collector, is no objection to the maintenance of the action by the harbor commissioners against the sureties of the wharfinger for money which had become due from the wharfinger before his removal from office and before the change in the law.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion.

W. H. Barrows, and *J. F. Wendell*, for Appellants.

Under the constitution of the state, the amendment of

a statute operates as an absolute repeal of the old statute or section so amended. (*Norris v. Crocker*, 13 How. 429; *Billings v. Harvey*, 6 Cal. 381; *Billings v. Hall*, 7 Cal. 3; *Morton v. Folger*, 15 Cal. 275; *People v. Tisdale*, 57 Cal. 104; Bishop on Written Laws, sec. 152.) And this even though the amendment takes nothing away from the old law, but merely adds a proviso in certain cases. (*Billings v. Harvey*, 6 Cal. 381.) The constitutional provision construed in this case (*Billings v. Harvey*, 6 Cal. 381), viz., subdivision 25 of article IV. of the old constitution, is embraced in subdivision 24 of article IV. of the new constitution, and the language is identical as to the portion construed. A repeal of a statute under which a right of action exists operates as an extinguishment of such right of action, and of actions pending thereon when the repeal takes effect, unless there is a saving clause. (Sedgwick on Statutory and Constitutional Law, 2d ed., 110 et seq.; Bishop on Written Laws, secs. 117, 117a, and cases cited; *McMinn v. Bliss*, 31 Cal. 122; *Norris v. Crocker*, 13 How. 429, and cases cited; *Bensley v. Ellis*, 39 Cal. 313; *People v. Central Pac. R. R. Co.*, 62 Cal. 506; *Mayne v. Board etc.*, 123 Ind. 132; *Key v. Goodwin*, 4 Moore & P. 431.) Now, the present article does not authorize wharfingers to collect money at all, and the article must be construed as though originally adopted in the form it now stands. (Bishop on Written Laws, sec. 152a, and cases cited; *McKibben v. Lester*, 9 Ohio St. 627; *Conrad v. Nall*, 24 Mich. 278; *Holbrook v. Nichol*, 36 Ill. 161; *Wood v. Election Comm'rs*, 58 Cal. 565.)

F. S. Stratton, and *T. C. Coogan*, for Respondent.

FOOTE, C. — This action is brought against the defendants, as the sureties on the bond of one William M. H. Haynie, as wharfinger, appointed by the board of state harbor commissioners, to recover certain moneys lost to the said board by the delinquency of said Haynie. The cause was tried before a jury, who returned a verdict

for the plaintiff in the sum of \$800.30. Judgment was rendered accordingly. Upon motion made for a new trial, the court granted the same, unless the plaintiff should remit a certain portion of the judgment. This the plaintiff did, and a new trial was then, by an order, duly denied. From the judgment given and made in the premises, and from the order denying a new trial, this appeal is taken.

Two contentions are made for a reversal of the judgment and order: 1. That the board of harbor commissioners have prosecuted the action without authority of law, because not done on the relation of the attorney-general. 2. That Haynie, the principal on the bond sued on, was appointed in March, 1880, removed from office on the 6th of March, 1883, after the delinquency complained of had taken place, and the action was commenced after a change was made in the statute, whereby the duties of the wharfinger as existing while Haynie was in office were conferred upon another officer, called a *collector*.

It is contended that after the passage of the amendment to section 2522 of the Political Code on March 7, 1883 (the day following the removal of Haynie from office), the board of state harbor commissioners could not sue for moneys which had been collected and not paid by a wharfinger, as said amendment had taken the collection of moneys from wharfingers and imposed it upon collectors.

We do not perceive how this change in the law, made after the duty was violated, could take away the right to make this wrong-doer responsible for his act, which right existed when he did the act complained of; for while, under the provisions of section 2522 as amended in 1883, the duties of a wharfinger in a matter such as this in hand were taken from him, as such officer, and put upon a collector, section 2523 of the same code, which was enacted in 1876, was in full force when the delinquency of Haynie took place, and was not changed when this action was brought.

Said section provides, among other things, that the

board of state harbor commissioners "may institute and prosecute to final judgment actions in the name of the people of the state of California . . . for the collection of any money due or that may become due the state by authority of this article." (Pol. Code, pt. III, tit. VI, art. IX.)

This money *had become due* under this article, before the change in the law. Hence we think the authority existed to bring this action and to prosecute it to final judgment, as was done.

We therefore advise that the judgment and order be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 14623. Department One.—June 18, 1892.]

HARVEY S. BLOOD, APPELLANT, v. GEORGE WOODS,
RESPONDENT.

TOLL-ROAD — EXPIRATION OF FRANCHISE — PUBLIC HIGHWAY. — A franchise for a toll-road granted by the legislature for the period of twenty years expires by limitation at the end of the twenty years, and the road then becomes a public highway.

ID. — POSSESSION OF TOLL-ROAD — COLLECTION OF TOLLS — PRESUMPTION. — A person in the possession of a road claimed by him to be a toll-road, authorized by the legislature to be continued for twenty years, who has collected tolls thereon for over twenty years since the passage of the act, and who shows no other franchise therefor, will be presumed to have claimed the right to tolls under the original grant, and to have collected them lawfully during the existence of the franchise, although there is no direct evidence that the persons named in the act, or their assigns, constructed the road, or that he was an assignee of such persons, or collected tolls under that franchise.

ID. — DEDICATION OF PUBLIC ROAD — CONDITION AS TO TOLLS. — The act of constructing and opening a toll-road for use, followed by public user thereof, constitutes a dedication of it as a public road. The fact that tolls are demanded, and that the public uses the road only upon condition of paying tolls, does not affect the question of dedication.

- 1D. — AUTHORITY OF SUPERVISORS — FREE PUBLIC ROAD — TOLLS — FRANCHISE. — The board of supervisors of a county has no authority to grant a franchise to collect tolls upon a free public road.
- 1D. — LEGISLATIVE ACT — EXCESS OF AUTHORITY — LIMITS OF PROCEDURE. — The granting of a franchise for a toll-road by the board of supervisors of a county is a legislative act, and the board, in granting it, cannot exceed the authority vested in them, or transcend the limits of the procedure required of them.
- 1D. — JUDICIAL INQUIRY AS TO CHARACTER OF ROAD — COLLATERAL ATTACK UPON AUTHORITY OF SUPERVISORS. — The granting, by the board of supervisors of a county, of a franchise to collect tolls, does not preclude inquiry by the courts as to whether the road was a toll-road or a free public highway, and their conclusion upon that fact may be questioned collaterally.
- 1D. — RECORD OF PUBLIC ROAD — DEDICATION. — It is not necessary that the board of supervisors of a county should cause a road to be recorded as such, to render a strip of land dedicated to the public as a public road a legal public highway.

APPEAL from a judgment of the Superior Court of Calaveras County.

The facts are stated in the opinion.

Reddick & Solinsky, for Appellant.

The right and privilege to collect tolls is a franchise. (*Truckee etc. Road Co. v. Campbell*, 44 Cal. 89. See also *People v. Davidson*, 79 Cal. 166; *Volcano Cañon Road Co. v. Supervisors*, 88 Cal. 634.) The authorities are unanimous on the proposition that the existence of a franchise cannot be questioned in a collateral proceeding. (*Truckee etc. Road Co. v. Campbell*, 44 Cal. 89. See also *Weaverville etc. Road Co. v. Supervisors*, 64 Cal. 69; *Volcano Cañon Road Co. v. Supervisors*, 88 Cal. 634; *Stony Hill etc. Road Co. v. Supervisors*, 88 Cal. 632.) The method of attacking the validity of a franchise is laid down in section 803, Code of Civil Procedure, and is the course that should have been adopted to test the legality of plaintiff's franchise. It is the rule that is applied to corporations, when the question of the validity of the incorporation is called in question. (*Bakersfield Town Hall Ass'n v. Chester*, 55 Cal. 98; *Stockton etc. Gravel Co. v. Stockton etc. R. R. Co.*, 45 Cal. 680; *Rondell v. Fay*, 32 Cal. 354; *Oroville R. R. Co. v. Supervisors*.)

87 Cal. 354; *Pacific Bank v. De Ro*, 87 Cal. 538.) It is the rule that is applied to questions involving the right to hold office. (*Hull v. Superior Court*, 63 Cal. 174; *Buckner v. Veuve*, 63 Cal. 304; *People v. Toal*, 85 Cal. 338.) The supreme court of this state has repeatedly recognized the fact that the management and control of public roads rests with the boards of supervisors of the various counties of the state. (*Kimball v. Supervisors*, 46 Cal. 23; *Waugh v. Chauncey*, 13 Cal. 11; *Fall v. Paine*, 23 Cal. 302; *Sherman v. Buick*, 32 Cal. 250; 91 Am. Dec. 576; *People v. Duncan*, 41 Cal. 507; *People v. Davidson*, 79 Cal. 166; *People v. O'Keefe*, 79 Cal. 171.) The supreme court has further recognized that boards of supervisors have jurisdiction and power to grant franchises to collect tolls on roads. (See *People v. Davidson*, 79 Cal. 166; *People v. Duncan*, 41 Cal. 507; *Bartram v. Central Turnpike Co.*, 25 Cal. 283.) The board of supervisors of Calaveras County had the power and jurisdiction to grant the franchises to plaintiff, and therefore its orders made in this respect cannot be collaterally attacked, any more than the judgments of courts of record. (*Waugh v. Chauncey*, 13 Cal. 11; *Fall v. Paine*, 23 Cal. 302; *Thomas v. Armstrong*, 7 Cal. 287.) The toll-road in question is not a free public highway, as it was not so declared by the board of supervisors. (Pol. Code, sec. 2643, subd. 2; *Welsh v. County of Plumas*, 80 Cal. 338.)

W. C. Green, for Respondent.

The facts in this case show that the road was dedicated to the public without question, for even legalized toll-roads or turnpikes are public highways. (*People v. Davidson*, 79 Cal. 168.) It was enough that the public used the road for the purpose of travel. The finding, therefore, that there was a dedication, was authorized, and must be sustained. (See also *People v. O'Keefe*, 79 Cal. 172; *Bolger v. Foss*, 2 West Coast Rep. 898; *Washburn on Easements*, 139, 140.) The contention of counsel for the plaintiff, to the effect that it was compulsory for the board of supervisors to record all public high-

ways before they become free public highways, does not need further answer than to simply say, that while it is the duty of the supervisors to record such highways, they are none the less free public highways if they do not do so. (*People v. Davidson*, 79 Cal. 166; Pol. Code, sec. 2619.) The board of supervisors are a municipal body, having no powers except those expressly granted by the sovereign authority, or which are necessary to the exercise of the powers granted in terms. There is no act of the legislature of this state which invests the board of supervisors with authority to convert a public highway into a toll-road, and to grant to an individual the right to collect tolls of persons traveling the highway. (*El Dorado County v. Davison*, 30 Cal. 523.) A board of supervisors is an inferior tribunal of limited and special jurisdiction, and in the exercise of its judicial powers, its authority must affirmatively appear, and nothing can be presumed in its favor. Plaintiff does not consider the difference between a void and a voidable judgment. The board of supervisors acted judiciously when it attempted to grant the franchise to plaintiff. The act was therefore in the nature of a judgment; but its act was absolutely void, and hence could be collaterally attacked. (See *Whitwell v. Barbier*, 7 Cal. 54; *McMinn v. Whelan*, 27 Cal. 300; *Forbes v. Hyde*, 31 Cal. 342; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *People v. Harrison*, 84 Cal. 608.)

TEMPLE, C. — Appeal from a judgment taken within sixty days after its rendition.

The action is to recover tolls claimed to be due from defendant for passing over plaintiff's alleged toll-road. The validity of the franchise is questioned.

An act of the legislature of this state, passed April 8, 1863, granted to certain persons named, to be incorporated as "Silver Mountain Turnpike Company," a franchise to construct and maintain a toll-road from a point in Calaveras County to a point then in Mono County, now Alpine, — the franchise to continue for twenty years,

— tolls to be fixed by the supervisors of the county of Calaveras.

The record contains no direct evidence that the persons named, or their assigns, or the corporation, ever constructed the road under this act. The plaintiff, however, testified: "I have been on this road twenty-seven years. It has been a toll-road for the use of the public ever since that time. It has been a toll-road ever since 1862. This is the same road referred to in the act of the legislature of this state of April 8, 1883. People have traveled over this road both in Calaveras County and in Alpine County ever since then by paying tolls."

The road was known as the Big Tree and Carson toll-road, and the court finds from the above evidence that it is the road referred to in the act of the legislature.

On the seventh day of April, 1887, the board of supervisors of the county of Calaveras passed the following ordinance:—

"ORDINANCE No. 20.

"The board of supervisors of the county of Calaveras do ordain as follows: 1. H. S. Blood is hereby granted the right, privilege, and franchise to collect tolls at a rate to be fixed by this board on that portion of the 'Big Tree and Carson Valley toll-road,' situated and being in this county, to wit: Beginning at the Big Trees, and extending easterly to the boundary line on said road between Calaveras and Alpine counties, for the period of ten years after the twenty-third day of April, 1887."

Rates of toll were fixed, and plaintiff proceeded to collect tolls at Bear Valley station, which was in Alpine County. No toll-gate had been authorized by the board in Calaveras County.

May 7, 1890, the board of supervisors passed the following order:—

"Petition of H. S. Blood, owner of the franchise to collect tolls on the so-called Big Tree and Carson Valley toll-road, received and filed, petitioning this board to establish and fix a toll-gate and place to collect tolls at

Gardner's or Cold Spring ranch, about two and a half miles from the Big Trees in Calaveras County, also petitioning this board to fix the rate of toll to be collected on this road for the ensuing year. On motion it was unanimously ordered that a toll-gate and place to collect tolls on said road be and the same is hereby established at Gardner's house, on the said Cold Spring ranch, about two and a half miles from Big Trees, in Calaveras County, and the said H. S. Blood is hereby authorized and empowered to collect tolls on said road at said Gardner's house."

The court found that the road in question was a free public road, and that the ordinance granting the franchise to plaintiff, and the order authorizing a toll-gate at Gardner's, were void.

The appellant claims, — 1. That the evidence does not show that the road was a free public road, but, on the contrary, that it was a private toll-road, belonging to him; 2. If it were a free public road, still the ordinance and order are valid; and 3. The ordinance is conclusive, and the court cannot go behind it to inquire whether the requisite facts to authorize the board to grant the franchise existed or not.

If the appellant can be regarded, under the evidence, as the successor of the beneficiaries of the act of the legislature, the answer to the first proposition is easy. By limitation the franchise expired in twenty years, and the road became a free public highway. (Pol. Code, sec. 2619.)

This provision of the code, and the *status* of the road after the expiration of the franchise, was fully considered in *People v. Davidson*, 79 Cal. 166.

But the appellant contends that it was not shown that the persons or the company named in the act, or their assigns, ever constructed the road authorized by that act, or that he was the assignee of such persons, or ever collected toll under that franchise.

He testifies that the road is the road authorized by

that act. That ever since the passage of that act, the public has been using the road, paying tolls for so doing, and that he has been there collecting tolls for twenty-seven years. In other words, he has been in possession, claiming to own this franchise, and has enjoyed the benefit of it. Although the record is silent on that point, we must conclude that he has had the rates of toll fixed by the board, and toll-gates authorized. We cannot presume that he has demanded and received, for all these years, tolls as a wrong-doer. In fact, in his evidence and in his specifications, he claims that the road was a toll-road. It could only be made so by a grant of a franchise from some source. Such a grant is shown, and as there is no claim that there was any other, we must conclude that the appellant claimed the right to collect tolls under that franchise. He certainly enjoyed the benefit of it, and cannot now escape the conditions of the franchise under the claim that his title was bad, and all his acts illegal and wrongful.

But the same consequence would follow, if he could escape the conditions of the grant of the franchise by showing that his title was bad. In *People v. Davidson*, 79 Cal. 166, it was held that the fact that tolls are demanded, and that the public uses the road only upon condition of paying tolls, does not affect the question of dedication. There is the offer of the land to the public, and an acceptance of the offer. That portion of the road which was in Calaveras County, up to 1890, had not only been used as a public road, but as a free public road, by all who did not travel as far as Bear Valley in Alpine County. The defendant and his neighbors had had the free use of it. If plaintiff had no franchise; there was nothing to connect it with his road in Alpine County. It was a road thrown open to the public, and accepted and used by it. These acts would constitute a dedication.

This brings us to the question, conceding that it had become a free public road, Could the board grant to plaintiff a franchise to collect tolls thereon?

To establish his position, appellant points out that prior to the passage of the County Government Act, subdivision 4 of section 4046 of the Political Code, authorized boards of supervisors to lay out and control public roads, turnpikes, etc., and in subdivision 17 of section 4046, to grant licenses and franchises as provided by law for constructing, keeping, and taking tolls on roads, etc.

These provisions were re-enacted in the County Government Act in 1883. This act was amended in 1889. (Stats. 1889, p. 233.) Subdivision 4 of section 25 of this act reads:—

“Sec. 25. The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law, — . . . 4. To lay out, maintain, control, erect, and manage public roads, turnpikes, ferries, and bridges, within the county, and to grant franchises and licenses to collect tolls thereon.”

These general statements, grouping and to some extent defining the power of the board, cannot be held to place the board above the procedure elsewhere prescribed, which often very materially limits the jurisdiction and power apparently conferred by this general language, and in the amendment to the county government act, above quoted, the power is expressly limited and restricted.

Turning now to the provisions as to toll-roads, we find, commencing with section 2779 of the Political Code, a chapter with reference to toll-roads. Article 1 is entitled: “Construction of toll-roads.” And the first section in the chapter prescribes a procedure where the company requires the use of the power of eminent domain.

It will be seen that the board must appoint commissioners to lay out the road, and that they control the location.

Section 2789, in this chapter, prescribes what shall be done where the company has no occasion to condemn lands. Then follow many provisions in regard to con-

struction and management, erection of bridges, toll-gates, etc. To a large extent these roads are placed under the control of the board of supervisors.

In the Civil Code, commencing with section 512, are provisions defining, even more minutely, what shall be done to establish toll-roads.

Toll-roads are public roads, as much so as free public highways, and the statute relied upon by appellant confers the power to manage and control them upon boards of supervisors, as public roads.

The public roads, therefore, upon which the board may regulate the collection of tolls, are the roads so constructed, and the mode in which the board must exercise the power to grant such franchises is prescribed by the statutes and procedure alluded to.

Appellant relies for authority upon *People v. Davidson*, 79 Cal. 166. There was no such question before the court in that case. It was not claimed that the road, before the granting of the franchise, was a public highway. The only questions discussed, as stated by the court itself, were, whether the use by the public of the road upon condition of paying tolls amounted to a dedication, and whether, when the franchise defendant claimed had expired, the road became a free public road. So far as these two questions are concerned, I have based this decision largely upon that case. Nothing further was there decided.

That the board of supervisors has no authority to grant a franchise to collect tolls upon a free public highway was expressly held in *El Dorado County v. Davison*, 30 Cal. 521.

Does the fact that the board has attempted to grant a franchise to collect tolls imply that the board has decided that the road is not a free public highway, but is a toll-road within the meaning of this opinion? and if so, is that conclusion one that can be questioned collaterally?

The granting of a franchise is a legislative act. It is the use of delegated power, and the board cannot exceed

its authority. No case has been cited, and I know of none, in which the right to inquire whether the power has been used upon a subject-matter not within the grant of power has been questioned, in whatever form it becomes material. In cases where the right to exercise the power depends upon the existence of some fact which the board may or may not be authorized to determine, the board, as to such preliminary matter, acts in a capacity somewhat different. Whether courts can go behind such a conclusion has been and perhaps is a vexed question. But it is not involved here. No such authority is given the board, and the point is, that the act is not within the authority delegated to the board, and could not be done under any circumstances.

The act of accepting a road as one constructed under the authority of the code, and of fixing tolls, is to some extent a judicial act. But I see nothing in this which can preclude inquiry. To give these acts that effect would enable the board to do an act wholly outside of its authority, and then by a subsequent assertion place it beyond question. Certainly this cannot be done. The cases cited by appellant have no bearing upon the question.

It is not necessary that the board of supervisors should cause a road to be recorded as such, to render a strip of land dedicated to the public as a public road a legal public highway.

I think the judgment should be affirmed.

VANOLIEF, C., and BELOHER, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 14694. Department Two. — June 18, 1892.]

NEWTON W. CRANE, APPELLANT, v. ROBERT O. FORTH ET AL., RESPONDENTS.

APPEAL FROM JUDGMENT — PRESUMPTION — FINDINGS — FORECLOSURE OF MORTGAGE — STREET ASSESSMENT — ASSIGNMENT OF MORTGAGE — DEFICIENCY JUDGMENT AGAINST ASSESSOR. — When an appeal is taken upon the judgment roll alone, without any bill of exceptions or findings of fact, in an action by an assignee of a mortgage to foreclose the mortgage, and also a street assessment lien purchased by him to protect his mortgage interest, and it appears that the assignor of the mortgage denied the validity of the assessment, the presumption, from a judgment refusing to enforce the assessment against the assignor in a deficiency judgment against him, must be, that the court found in his favor on the issue as to the validity of the street assessment, though the judgment makes the lien a charge upon the mortgaged property as against the other defendants who admitted the allegations of the complaint.

IB. — COSTS — DISALLOWANCE — PRESUMPTION AS TO COST BILL. — Upon an appeal from a judgment not providing for costs, taken upon the judgment roll alone, without any bill of exceptions or statement, where it does not appear that the prevailing party filed or served any cost bill, nor that he in any manner moved the court, either before or after final judgment, to allow him costs, it cannot be presumed that he filed or served any cost bill, but must be presumed that the judgment is correct; and an objection that the court erred in refusing a judgment for costs will not be considered.

IB. — MODE OF ASSAILING ERROR AS TO COSTS. — An error of the trial court in denying a party costs *before* final judgment should be shown by a bill of exceptions, or a statement on motion for a new trial. An erroneous order *after* final judgment, relating to costs, can only be considered upon an appeal from such order.

APPEAL from a judgment of the Superior Court of Ventura County.

The facts are stated in the opinion.

W. H. Wilde, for Appellant.

Blackstock & Shepherd, E. S. Hall, and J. Hamar, for Respondent.

VANOLIEF, C. — On February 1, 1888, Robert W. Forth made his promissory note to the defendant Parnard, for four hundred dollars, payable one year after date, with interest at one per cent per month, and to secure the

same executed to Barnard a mortgage of same date on a lot of land situate in the town of San Buenaventura, county of Ventura. May 28, 1888, Forth died intestate. On June 16, 1888, the widow, Caroline, was appointed administratrix of Forth's estate. Publication of notice to creditors to present their claims within four months was duly made, commencing on June 22, 1888; but Barnard failed to present his note or mortgage within the four months, or at all. On March 14, 1889, Barnard assigned the note and mortgage to the plaintiff for a consideration of four hundred dollars, then paid, which was equal to the amount then due upon the note, the interest having been paid to Barnard up to the date of the assignment. The written assignment of the note and mortgage, made on a separate paper, contained the following clause: "And the party of the first part (assignor) does hereby make, constitute, and appoint the said party of the second part his true and lawful attorney, irrevocable, in his name or otherwise, *but at the proper costs and charges of the said party of the second part*, to have, use, and take all lawful ways and means for the recovery of the said money and interest." On December 31, 1889, the authorities of the town of San Buenaventura claimed to have levied a street assessment of \$163.20 upon the mortgaged lot, in favor of one Safford, who demanded payment thereof, and threatened to foreclose it as a lien upon the lot; whereupon plaintiff, as he alleges, to protect his mortgage interest, took from Safford an assignment of the street assessment, and the alleged lien therefor, and paid Safford the amount of the assessment.

Plaintiff commenced this action on February 14, 1891, to foreclose both the street assessment and the mortgage, alleging substantially the facts above stated, and in addition thereto, that Barnard indorsed the mortgage note; and praying judgment against the *defendants* for the amount due upon the note and mortgage for principal and interest; that the mortgaged premises be sold for cash, *subject* to the lien of the street assessment, "or in default thereof, that the proceeds of said sale be appro-

priated and applied to the costs and expenses thereof, to the payment of the costs of this action, and attorney's fees therein, to the payment and discharge of said assessment, and the amounts due thereon, and that the balance of said proceeds be applied to the payment of the amount due the plaintiff herein; . . . and that said plaintiff may have judgment and execution against the said defendant, Charles Barnard, for any deficiency," etc.

The answer of the defendants, other than Barnard, admits the facts stated in the complaint, and prays that any surplus of the proceeds, "after satisfying the judgment of the plaintiff herein," be paid to them; but if there remains no surplus, that they "may go hence without costs," etc.

The defendant Barnard in his answer denied that he indorsed the note; admits that his name was written to a receipt indorsed upon the note for interest paid him before he assigned the note, but denies that it was written or intended as an indorsement of the note to plaintiff; denies all the averments of the complaint relating to the street assessment; alleges that, at the time of the assignment, the value of the mortgaged property was eight hundred dollars, and that plaintiff neglected to enforce payment of the note by suit or otherwise, nine months after the assignment, during which period he might have foreclosed the mortgage, and thereby realized the whole amount due thereon before the alleged street assessment was levied, and that since said assessment the property has greatly depreciated in value.

Findings of fact were waived. The court decreed a sale of the mortgaged premises by the sheriff, and from the proceeds ordered the sheriff to pay to the plaintiff \$512, the amount found to be due on the note and mortgage, and from the surplus, if any, to pay plaintiff the further sum of \$188.36, for principal and interest of the street assessment; and should a surplus still remain, that it be paid into court for the defendants, other than Barnard. And the court further ordered and adjudged, that if the money proceeds of the sale should be insufficient

to pay the note and mortgage, that the sheriff return the deficiency, and that the clerk docket a judgment therefor against the defendant Barnard alone; and that the other defendants be free from all liability for such deficiency.

The plaintiff brings this appeal from the judgment, upon the naked judgment roll, without any bill of exceptions.

1. It is contended that the court erred in directing the proceeds of the sale to be first applied to the payment of the note and mortgage; that the street assessment should have been first paid, and that a judgment should have been docketed against Barnard for the deficiency of the proceeds of the sale to pay both the assessment and the mortgage, since he was liable for both, and the mortgage was subject to the assessment. This, however, involves the untenable assumption that the street assessment was valid. Barnard denied the validity of that assessment, and the presumption, from the judgment roll containing no bill of exceptions nor findings of fact, must be that the court found in his favor upon the issue as to the validity of the street assessment. That the court allowed the street assessment as against the other defendants, who were the owners of the mortgaged property, is accounted for by the fact that they, in their separate answer, expressly admitted "the truth of the allegations in the complaint contained."

2. It is contended for appellant that the court erred in refusing plaintiff a judgment for costs. This point has no foundation in the record. It merely appears that there is no judgment for costs. It does not appear that plaintiff filed or served any cost bill, and it cannot be presumed that he did. (*Riddell v. Harrell*, 71 Cal. 254; *Thompson v. Brannan*, 76 Cal. 618.) Nor does it appear that he in any manner moved the court, either before or after final judgment, to allow him costs. But if the court erred in denying him costs *before* final judgment, the error should have been shown by bill of exceptions, or statement on motion for new trial. (*Muir v. Meredith*, 82 Cal. 19.) Had the court made an erro-

neous order *after* final judgment, relating to costs, the only remedy would be by appeal from such order. (*Empire Co. v. Bonanza Co.*, 67 Cal. 406.) Upon the record here it must be presumed that the judgment is correct.

I think the judgment should be affirmed.

BELCHER, C., and TEMPLE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 18915. In Bank. — June 18, 1892.]

A. C. DIETZ, APPELLANT, v. THE MISSION TRANSFER COMPANY, RESPONDENT.

LEASE—OPTION TO PURCHASE—PURCHASE OF PART BY LESSEE—RIGHTS OF OTHER PURCHASERS FROM LESSOR.—Where, by the terms of a lease, the lessee had the option to purchase the land within thirty days after notice by the owners of the land, and while he was in possession of the land under the lease, and entitled to purchase, the owners of the land, by a deed of grant, bargain, and sale, conveyed a part of the land to him, the fact that the grantors had, prior to the deed but subsequent to the lease, entered into an agreement for the sale of the property to other parties, could not deprive him of the benefit of his agreement and conveyance, or entitle them to any greater rights in the portion of the tract sold to him than those named in the exceptions and reservations contained therein.

ID.—EXCEPTIONS IN DEED—RIGHT TO BORE FOR OIL.—Where the deed to the lessee of part of the tract expressly excepted from its operation "all oils, petroleum, asphaltum, and other kindred mineral substances," and contained a reservation of "the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the premises," etc., a purchaser of the rights of the grantor, although not having the right to use the land conveyed to the lessee for the purpose of pumping or storing oil found in other portions of the tract, has the right to go upon such part of the tract to develop it, and to tunnel and dig to ascertain whether any oil croppings exist, although there are none on the surface, being held to a reasonable exercise of the right to develop the oil.

ID.—EJECTMENT—JUDGMENT IN PRIOR ACTION AGAINST LESSEE—RES ADJUDICATA—DIFFERENT SUBJECT-MATTER.—A judgment for the plaintiffs in an action between the grantors of the lessee and their other grantee on the one part, and the lessee and others on the other part, wherein the plaintiffs alleged that the lessee's rights under his lease

had ceased by failure to purchase within the time provided for, and sought to restrain him from hindering the grantee plaintiff from entering upon the land to explore, develop, and extract oil therefrom, and in which the only thing considered and determined was the right of the lessee to retain possession of the land under his lease for the purposes therein specified, is not a bar to an action of ejectment by such lessee against the grantee plaintiff, in which the question as to the lessee's right to the possession as owner in fee of a part of the tract is involved, and in which he makes no claim of right to extract oil from the land, and does not dispute the right of the defendant to occupy the land for the purpose of taking oil, if oil exists.

12.—**DEED OF FIXTURES—IMPLIED RIGHT TO OPERATE FIXTURES AND OCCUPY LAND.**—A deed from the lessee and another person, of grant, bargain, and sale, conveying to the other grantee of the lessor all their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated upon any portion of the tract, conveyed to the grantee not merely the pipes, tanks, derricks, etc., as personal property, but carried with it the right to operate the same in the manner they theretofore had been operated by the grantee, and also the right to occupy sufficient land for the purpose of such use and operation.

APPEAL from a judgment of the Superior County of Ventura County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Noble Hamilton, Joseph A. Joyce, and R. M. F. Soto, for Appellant.

Charles Fernald, John J. Boyce, and Garber, Boalt & Bishop, for Respondent.

PATERSON, J.—On December 20, 1881, Carpentier and Steinbach were the owners in fee of a tract of land consisting of about twenty thousand acres, in Ventura County, and known as the Ex-Mission rancho. On that day they entered into a contract of lease with the plaintiff herein, by the terms of which plaintiff was to have the possession of the land, together with the buildings and improvements thereon, and the right to use all necessary land for the purpose of digging, boring for, developing, and taking oils, petroleum, asphaltum, and other kindred substances, and the right of way over the lands of the ranch for roads, where necessary for the purpose of transporting substances to market. The

lessors retained the right to pasture their cattle and sheep on the land, and to farm and cultivate all that portion of the premises not occupied for the purposes aforesaid. The lease was to continue for the term of three years from the first day of January, 1882. It was provided that in case the lessors should at any time sell the premises, or the right to take oil, petroleum, and kindred substances, the contract should "*ipso facto* terminate six months from a written notice of such sale," but that the plaintiff should not in any event be required to quit and deliver up possession of the premises before the first day of July, 1883. Dietz was to have the option of purchasing the property and privileges leased to him for the sum of one hundred and fifty thousand dollars, at any time within three years from the date of the lease. While the owners reserved the right to sell the lands with or without the rights referred to, to any other person at any time within the three years, it was provided that they should first give Dietz thirty days' notice for the exercise of his option to take the property at one hundred and fifty thousand dollars, or any less sum which they might be willing to take. If he did not purchase within thirty days after the notice, then the owners were to have the privilege of selling to any other person. On October 25, 1882, Carpentier and Steinbach notified Dietz that they had an offer of one hundred thousand dollars for the property and rights named in his lease, which offer they were willing to take, and that he must within thirty days of the notice exercise the option reserved to him in the lease. It does not appear whether Dietz made any reply to this notice. On November 23, 1882, Carpentier and Steinbach made, executed, and delivered to Dietz a deed, grant, bargain, and sale in form, conveying, in consideration of the sum of two thousand four hundred dollars, about four hundred acres of the twenty-thousand-acre tract above referred to. This deed excepted from the operation of the grant "all oils, petroleum, asphaltum, and other kindred mineral substances," and

contained a reservation of "the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the said premises, together with the right of way over and through any and all parts of said premises, for the purpose of going to and coming from said works, and transporting machinery, tools, implements, and supplies for said works, and of transporting said substances to a market, and the right to lay pipes to conduct oil, and the right to dispose of said substances, and of transferring to their grantees thereof the same rights as are herein reserved to the parties of the first part; but not to destroy or injure any crops growing upon or any improvements on said premises, such as buildings, trees, vines, roads, inclosures, without making just compensation for such injury or destruction. Reserving also to the parties of the first part the right of way for a road or roads over and across said premises, for the use of tenants or vendees of adjoining and other lands of said rancho." The party referred to in the notice of October 25th, as having made an offer of one hundred thousand dollars, was F. J. Whaley, with whom Carpentier and Steinbach had entered into an agreement on October 21st, by the terms of which they agreed to sell to him the property and rights described in the lease to Dietz, for the sum of one hundred thousand dollars, "subject to the pre-emption right of Alfred C. Dietz, as contained in the indenture of lease between Horace W. Carpentier and Rudolph Steinbach, dated the twentieth day of December, A. D. 1881." By the terms of this agreement, the purchaser was to pay ten thousand dollars when possession was delivered on July 1, 1883, and the balance in certain installments named, but it was provided that "the title of the said right is to be retained by the first party until performance." On November 25, 1882, Carpentier and Steinbach notified Whaley that they had given Dietz the notice required in the lease to him on October 25th, that the thirty days allowed him in which to exercise his option had expired November 24th, and that he had

elected not to purchase. On December 12, 1882, Dietz was notified that Carpentier and Steinbach had sold the property and rights described in his lease, and that his lease would, therefore, terminate on July 1, 1883, at which time they would require of him to quit and surrender up the possession of the premises. The deed from Carpentier and Steinbach to Dietz was recorded November 27, 1882. Whaley conveyed all his right, title, and interest to the defendant on October 28, 1882, and the latter has thus far complied with all the terms of the agreement with Carpentier and Steinbach.

The first matter presented for consideration is the question as to the effect of these conveyances and notices. It is claimed by respondent, that, "on the twenty-fourth day of October, 1882, and before the deed to Dietz of November 23, 1882, the Mission Transfer Company had acquired, through the assignment of the contract with Whaley, the general right over the *entire tract* to the mineral oils and asphaltum in the ground, to the right of entry upon the whole tract to mine and explore for oils and asphaltum, with the right of way over every part of it for the transportation of the oils, and every other right which was necessary to the enjoyment of the interest which they had acquired. They therefore had this right before the deed to Dietz was made, and whatever estate or interest in the particular four-hundred-acre tract he obtained by that deed was subject to the rights of the Mission Transfer Company, under the agreement of Carpentier and Steinbach with Whaley." We cannot agree with respondent in this contention. Under his agreement with Carpentier and Steinbach, and the notice which they gave him, Dietz had the right to purchase the property at any time before November 25, 1882. The thirty days' notice was served on him on October 25, 1882. This gave him to and including November 24th in which to exercise his option. While he was thus in possession of the land under his lease, and entitled to purchase, the owners of the land, by a deed of grant, bargain, and sale, conveyed a part of the

rancho to him for the consideration of two thousand four hundred dollars. So long as the owners of the land were willing to convey four hundred acres of the entire tract, nobody could be heard to complain, so far as Dietz was concerned. If Whaley or the Transfer Company had any ground of complaint, it was against Carpentier and Steinbach. The contract between these parties could in no way bind Dietz. He became the owner of the four hundred acres before the expiration of the time within which he was required to exercise his option, and the fact that his grantors had entered into an agreement for the sale of an interest in the property to Whaley could not deprive him of the benefit of his agreement and his conveyance. We do not see how the defendant can be heard to complain, unless it be held that plaintiff was bound to purchase the entire tract of twenty thousand acres, or none at all,—a proposition which cannot be maintained.

Our conclusion, therefore, on this branch of the case is that the defendant acquired no right by virtue of its purchase from Carpentier and Steinbach to use the land in controversy for the purpose of operating an oil plant, in developing, transporting, and storing oil found on other portions of the rancho. Its right in this regard is acquired solely through the exceptions and reservations found in the deed to plaintiff, and the conveyance to it by Carpentier and Steinbach. It has the right to go upon the land in controversy under those exceptions and reservations for the purposes therein named, but its operations under the terms of the deed must be confined to the four-hundred-acre tract. The plaintiff's grant conveyed to him the absolute title to the four-hundred-acre tract, with the exception of the oil, asphaltum, and other kindred mineral substances therein, and the right reserved to erect machinery, sink wells, etc., *on said tract*.

It is contended by appellant that the exceptions and reservations in the deed to Dietz do not give the defendant the right to go upon the four-hundred-acre tract for

the purpose of developing oil, and that, as the evidence shows there is no oil on that portion of the ranch, the defendants have no right there; but the plain meaning of the language used in the deed does not support this theory. The terms, "sink wells, bore, *tunnel, dig for,*" certainly mean the right to develop. The fact, if it be a fact, that there are no oil croppings on the surface, will not prevent defendant from digging, tunneling, etc., to ascertain whether any exist below the surface. How much tunneling, boring, digging, etc., may be done by the defendant for the purpose of developing oil cannot be determined in advance. "All that can be said in that regard is, that they would be held to a reasonable exercise of the right to develop the [oil] water." (*Painter v. Pasadena L. & W. Co.*, 91 Cal. 86.)

The defendant pleaded in bar of plaintiff's cause of action a judgment entered in the superior court of the city and county of San Francisco, on June 30, 1884, in an action between Steinbach, Carpentier, and the Mission Transfer Company, plaintiffs, and Dietz, Hill, and Adams, defendants. The plaintiffs in that action alleged all the facts we have stated above in relation to the transactions between the various parties, excepting the fact of the conveyance from Carpentier and Steinbach to Dietz, and claimed that Dietz had lost all rights under his lease from Carpentier and Steinbach by failure to purchase within the thirty days following the notice given, and by virtue of the provisions of the lease requiring him to quit and deliver possession on July 1, 1883, but nevertheless he was unlawfully holding, and claiming the right to hold, possession of the land for the purpose of extracting oils, etc., and although demand had been made he had refused to permit the respondent to enter upon the land for the purpose of exploring, developing, or extracting the oil therefrom. In his answer to this claim, Dietz denied that he had lost his rights under the lease, and insisted that he was still entitled to retain possession of the lands for the purposes named therein. The court's findings of fact were confined to

the matters averred in the complaint and denied in the answer, and its conclusion of law was, that "said grant or license to said Dietz, and all the rights and privileges thereunder, did actually and *ipso facto* cease and determine on the first day of July, 1883." It is true the court decreed that the plaintiff was entitled to judgment restraining the defendants from hindering, delaying, or preventing the Transfer Company "from entering into and occupying all and singular the lands and premises and from erecting and constructing thereupon buildings, tanks, pipe lines, machinery, and other apparatus, and from drilling and sinking wells," but this provision must be read in connection with the issues made, and the court's findings of fact and conclusion of law. If the plaintiffs in that action had alleged in general terms the ultimate fact of their right to the possession of the land for the purposes named, the contention of respondent would doubtless be sound. This they did not do, but preferred to set forth specifically the facts upon which Dietz had acquired the right to possession of the land for the purpose of exploring for oil, and the reasons why such right had ceased to exist. Dietz was not bound to, and did not in fact attempt to, go beyond the case made by the complaint. The only thing considered and determined in the case was the right of Dietz to retain possession of the land under his lease from Carpentier and Steinbach, and for the purposes therein specified. In this case another and entirely different question is presented, namely, plaintiff's right to the possession as owner in fee of a part of the tract. The question as to his right to extract oil from the land, or any part of it, is not here involved; he makes no such claim; nor does he dispute the right of the respondent to occupy any portion of the land for the purpose of taking oil therefrom, provided oil exists therein. He insists that no oil exists in this four-hundred-acre tract owned by him, and for that reason the respondent has no right to be there at all.

On May 29, 1886, Dietz and Hill, by a deed of grant,

bargain, and sale, conveyed to the respondent all their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated upon any portion of the rancho. Upon a further consideration of the terms of this instrument, and the circumstances under which the deed was made, we are convinced that it conveyed to the defendant not merely pipes, tanks, derricks, buildings, etc., as personal property, but that the transfer necessarily carried with it the right to operate the same in the manner they theretofore had been operated by the defendant. That such was the intention of the parties we think is clear from the language of the deed. "Granted, bargained, sold," are words usually employed in instruments conveying real property. The instrument speaks of pipes, *pipe lines*, and *fixtures*. The term *pipe line* evidently means something different from *pipes*, and conveys the idea of a line of pipe running upon or in the earth, carrying with it the right to the use of the soil in which it is placed. The use of the phrase "other personal property" does not militate against the construction we place upon the deed. Some of the things mentioned are shown to be affixed to the soil and a part of the realty. The phrase referred to covers simply personal property not previously mentioned, but of the same kind or nature. It certainly would not be contended that the words "other personal property" would include the cattle and other stock running on the rancho.

In view of what has just been said, it is unnecessary for us to consider the question of title by adverse possession. The deed referred to conveyed the plant as it existed on the four-hundred-acre tract in 1886, and it is not claimed that any right by adverse possession to any additional property has been acquired since that time. The evidence shows that the plant which defendant now claims the right to operate is substantially the same as it was on May 29, 1886.

Our conclusions upon the whole case are: 1. That the conveyance from Carpentier and Steinbach to defendant

does not invest the latter with authority to use the land in controversy for the purpose of pumping or storing oil found in other portions of the twenty-thousand-acre tract, but that the interest acquired by plaintiff through his deed from Carpentier and Steinbach is subject to the right of the defendant on the four-hundred-acre tract only to take and do the things named in the exceptions and reservations contained in the deed of November 23, 1882; 2. That the judgment of June, 30, 1884, is not a bar to plaintiff's cause of action; 3. That by the deed of May 29, 1886, from Dietz and Hill to defendant, the latter became the owner of all the "buildings, tanks, derricks, pipes, pipe lines, fixtures," on the land in controversy, and all other personal property of a similar nature connected therewith, and the right to occupy sufficient land for the use of said property, for the purposes and in the manner it had theretofore been operated by the defendant; 4. That defendant is not confined in its operations to portions of the land in controversy where oil is found upon the surface only, but that it is entitled to go upon any portion of the land, and use any reasonable means to enjoy the exceptions and reservations named in the deed of November 23d.

Upon the evidence the court properly found that plaintiff could not maintain ejectment; but the decree awards to the defendant greater rights and privileges than it is entitled to. As some of the findings, however, are not warranted by the evidence, we could not, without making new findings, direct a modification of the judgment.

The judgment and order are reversed.

McFARLAND, J., SHARPSTEIN, J., and GABOUTTE, J., concurred.

HARRISON, J., concurring.—I concur in reversing the order and judgment appealed from, and I also concur in the opinion of Mr. Justice Paterson, except in that portion thereof wherein he holds that the deed to the re-

spondent of May 29, 1886, carried with it the right to operate and use the property therein conveyed for the purpose and in the manner it had been theretofore operated by the defendant, and also the right to occupy sufficient land for the purpose of such use and operation. The instrument itself purports to be nothing more than a transfer of the interest of the plaintiff and Hill "in and to the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property" that was then or at any other time upon the twenty-thousand-acre tract of land. There is nothing in the instrument which requires a construction to be given to it that will include more than is expressed in the words of the description, nor is there any evidence of surrounding circumstances which justifies an inference that the parties to the instrument had in their minds any other property than that which is described, or that it was their intention to transfer any right in addition to the property therein specified. With the exception of "pipe lines," the terms of description used in the instrument are peculiarly applicable to personal property, and the subsequent clause, "and all other personal property," shows that only personal property was intended. A "building," without any qualification or other term of description, is essentially personal property, and in this state especially it is frequently the subject of sale and transfer as personal property. Whether in any instance it is other than personal property by virtue of its being attached to the soil is a question of fact to be determined from the circumstances of that case. (*Miller v. Waddingham*, 91 Cal. 379.) Even if any of the buildings that were upon the land in question had been so affixed, they would have passed by the subsequent term "fixtures," which was doubtless used to obviate the possibility of any dispute concerning the character of the property transferred. Although the title to fixtures will pass under a grant of the realty, it is not the rule that the realty or right to its use will pass under a transfer of the fixtures. In the absence of any other evidence,

the use of the term "fixtures" in the instrument would be limited to the fixtures themselves, and would imply that they were to be severed and taken away. A sale of the "trees" upon a tract of land is not a transfer of the land itself, and gives to the grantee merely the permission to go upon the land for the purpose of removing the trees; and the transfer of buildings or other improvements upon land is not within the statute of frauds, and may be made by parol.

The use, in the instrument, of the words "grant, bargain, and sell," does not vary the construction to be given to it. These terms are expressly limited therein to the "interest" of the grantors in the property described, and the other terms "transfer and set over," which are used therein instead of the word "convey," have reference exclusively to personalty.

It is held that a conveyance of a "mill" or a "wharf" or a "well" or a "bridge" will, without the use of any term expressly descriptive of real estate, pass the land connected therewith, upon the principle that in such a case the land is an essential element of the thing described, and passes by the use of a term which is sufficiently comprehensive to include it. So, too, when a conveyance is made of a "dwelling-house" or a "barn," and it is shown that the parties to the transaction were negotiating in reference to the *place*, including the land on which the structure was situated, it is held that the land will pass. Such construction rests upon the principle that when land is occupied or improved by a structure designed for a particular purpose, which comprehends a practical enjoyment and use of the land, and in which the land is of subordinate consideration to that of the purpose, a term which is descriptive of the purpose to which the land is appropriated will be as apt for a conveyance of the land as would a description of the land itself. (*Johnson v. Rayner*, 6 Gray, 110.)

There is nothing, however, in the term "building," or in any of the terms used in the present instrument, which can be said to be descriptive of any purpose or

use in which the land is an essential element for its enjoyment; nor does the record in the present case disclose the nature or character of the "buildings" or "fixtures" intended by the transfer, or throw any light upon the circumstances attending the transaction; and in the absence of such evidence, there is no warrant for giving to the terms of the instrument any other than their ordinary construction. It does appear, however, from the record that Dietz had been the lessee from Carpentier and Steinbach of the entire tract of twenty thousand acres, and had made improvements upon the portions outside of the four-hundred-acre tract involved in this controversy, and it is as consistent to suppose that the terms used were intended to have reference to the improvements, outside of the four-hundred-acre tract. It also appears that after the deed to Dietz of this four-hundred-acre tract, the defendant had erected the improvements in question within the boundaries of that tract. Whether these structures were of such a character as to become fixtures, and thus belong to Dietz, or whether they were of a temporary character, does not appear, but the use of the term "fixtures" in the instrument of transfer, in addition to the term "buildings," would imply that the buildings themselves had not become fixtures.

It is not shown whether the pipe lines were upon the ground or imbedded beneath its surface; nor whether or to what extent they were used as conduits for oil from without the four-hundred-acre tract. If these pipe lines were part of a continuous conduit, or were imbedded beneath the surface of the ground, the effect of their conveyance would be to create an easement in the ground for their use, and to authorize their continuance in the same position for such use, with the right to the defendant to enter upon the land for necessary repairs, but the transfer to it of the other property named in the instrument gave to it no right to occupy the land for its use, and the plaintiff had the right to maintain this action

for the purpose of removing the defendant from the land held by it for the purposes of such use.

DE HAVEN, J., concurring. —I concur in the foregoing opinion of Mr. Justice Harrison.

[No. 18667. In Bank.—June 18, 1892.]

THE CITY OF SANTA CRUZ, RESPONDENT, v. JAMES ENRIGHT ET AL., APPELLANTS.

EMINENT DOMAIN—CONDEMNING USE OF WATER—MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—GENERAL LAWS.—Section 1001 of the Civil Code and section 1288 of the Code of Civil Procedure providing for the acquisition of private property by "any person, without further legislative action," through the exercise of the right of eminent domain, for the use of "canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town," are general laws within the meaning of section 6 of article XI. of the constitution, providing that cities shall be subject to and controlled by general laws, and are applicable to municipal corporations formed before, as well as to those formed after, the adoption of the constitution of 1879.

ID.—NECESSITY—DISTANCE OF SUPPLY—NEARER WATERS OWNED BY WATER COMPANY—INSTRUCTIONS.—Where the evidence shows that the waters of a creek from which a water company receives its supply are insufficient in quantity to supply the wants of the inhabitants of a city to which the company furnishes the water, during the summer months, and a portion of them are also inferior in quality, and that the population of the city is steadily increasing, and that the waters of the stream sought to be condemned by the city are excellent in quality, and abundant in quantity, and of sufficient elevation, the fact that the stream sought to be taken is further from the city than the streams from which the water company take their supply, although a matter to be considered, is not controlling upon the question of necessity, and where the instructions of the court as to the power to condemn, and the necessity claimed to exist, are correct, it is not error to refuse instructions predicated controllingly upon the question of distance, and upon the power of the city to condemn the waters owned by the water company.

ID.—WATER RIGHTS—PRIVATE LANDS—RIPARIAN OWNERSHIP—APPROPRIATION.—A riparian proprietor of private lands cannot acquire any right in the waters of the stream by mere appropriation.

ID.—PUBLIC LANDS—PRESUMPTION—BURDEN OF PROOF.—Where it does not appear whether the lands through which a stream ran at the time when a riparian proprietor claims to have acquired a right by appropriation were private or public property, it will not be presumed that they

were public lands, but the burden of proving that they were such lands devolves upon the claimant.

ID. — EVIDENCE — PRESCRIPTIVE RIGHT — NOTICE CLAIMING WATER — ERROR WITHOUT PREJUDICE — PRESUMPTION UPON APPEAL. — Where the evidence showed without conflict that the defendant had acquired a prescriptive right to the use of the waters of the creek sought to be condemned, and the jury were fully and fairly instructed in reference thereto, it must be assumed, upon appeal, that the jury allowed the value of the prescriptive right, and the action of the trial court in excluding a notice which had been posted up in a conspicuous place by the defendant's grantor at the place where the water was diverted, and which tended to show that the defendant claimed the right to divert the water adversely to all other claimants, although erroneous, is not prejudicial.

ID. — EVIDENCE — EFFECT OF IRRIGATION — QUALIFICATION OF EXPERT. — In a proceeding to condemn land, it is proper for the court to exclude the testimony of a witness as to his opinion, as an expert, as to the effect of irrigation upon the lands owned by the defendant, where it appears that the experience of the witness had been confined to another county, and he had never been upon the land in question, except for a period of one day in the winter, and it was not shown that the conditions, as to the climate, soil, topography, and rainfall, were the same in the county where the land was situated as they were in the county where the witness resided.

ID. — JUDICIAL NOTICE — COMPARISON OF CONDITIONS IN DIFFERENT COUNTIES. — The court will not take judicial notice whether the conditions as to climate, soil, topography, and rainfall are the same in one county as in another.

APPEAL from a judgment of the Superior Court of Santa Cruz County, and from an order denying a new trial.

The following are the fifth and sixth instructions requested by the defendants and refused by the court: 5. It is a fact admitted in this case that the Santa Cruz Water Company is a corporation organized for the purpose of supplying the city of Santa Cruz and its inhabitants with pure, fresh water, and that said company has acquired, and now holds title to, and the right to divert, the waters of Major's Creek and both branches of Branciforte Creek, for the purpose of so supplying said city and its inhabitants. In view of this admitted fact, the court instructs you that the city of Santa Cruz has the power to acquire from said company the waters of said streams, either by purchase or condemnation; and if you find, from the evidence, that the waters from

said streams are sufficient to supply said city and the inhabitants thereof with water, and you further find that both said streams are in much closer proximity to said city than Laguna Creek, and that they can be brought into and distributed through said city at less expense than the waters of Laguna Creek, then the court instructs you that the taking and acquisition of the waters of Laguna Creek is not, within the meaning of the law, necessary; and you will find a verdict for the defendants. 6. If the jury find, from the evidence, that the waters of Laguna Creek, at the point at which it is proposed to divert them, are eleven miles distant from the city of Santa Cruz, and they further find that much nearer than this to said city are the waters of Major's Creek, and of both branches of Branciforte Creek, and that said Major's Creek and Branciforte Creek afford a perennial flow of pure, fresh water, sufficient to supply said city and its inhabitants with pure, fresh water, and the jury further find that the waters of Major's Creek and Branciforte Creek have already been diverted and appropriated to, and are being used for, the purpose of supplying said city and the inhabitants thereof with water, then the court instructs you that the acquisition of the waters of Laguna Creek is not necessary for the supply of said city and its inhabitants, and the jury will find a verdict for the defendants. Further facts are stated in the opinion of the court.

D. M. Delmas, and Joseph H. Skirm, for Appellants.

The court erred in excluding evidence of the acts done in 1873 by the defendant Enright's predecessor, Gushee, the then owner of the land, for the purpose of appropriating the waters of Laguna Creek to his use. In order for defendant Enright to make out his title by prescription, it was necessary for him to prove that the right to the diversion and use of the water had been asserted from the beginning under a claim of title, with the knowledge and acquiescence of the person having a prior right. (*American Co. v. Bradford*, 27 Cal. 361.)

The rejected evidence was material and relevant to prove that the right had been so asserted. (*Alta Land Co. v. Hancock*, 85 Cal. 219, 223, 224; 20 Am. St. Rep. 217; *Frederick v. Dickey*, 91 Cal. 358.) There was error in the court's refusal to grant defendant's instruction relating to the rights acquired by him and his predecessors as prior appropriators of the waters of Laguna Creek; and in instructing the jury that rights to water cannot, in this state, be acquired by appropriation. (*Kimball v. Gearhart*, 12 Cal. 27; *De Necochea v. Curtis*, 80 Cal. 397; *Burrows v. Burrows*, 82 Cal. 564; *Artman v. Dixon*, 13 Cal. 38.) The presumption of law is that in 1872 and 1873, when these rights of appropriation are claimed to have had their origin, the lands through which this stream ran were public lands of the United States. (*Burdge v. Smith*, 14 Cal. 380; *Smith v. Doe*, 15 Cal. 101.) There is nothing in the record to show that at the time of the appropriation of the waters of this creek by defendant's predecessor, Gushee, the creek ran "through private property." Upon public lands of the United States, water rights may be acquired by appropriation. (*Burrows v. Burrows*, 82 Cal. 564; *De Necochea v. Curtis*, 80 Cal. 397; *Kimball v. Gearhart*, 12 Cal. 27.) The court erred in rejecting the testimony of the witness Ray upon the question of irrigation, and its effects upon the land in question, and whether or not the soil was benefited by it, as he was clearly an expert and entitled to testify, (*Ellis v. Tone*, 58 Cal. 289; *Buffum v. Harris*, 5 R. I. 243; Code Civ. Proc., sec. 1870, subd. 9.) An expert, as the word imports, is one having had experience. (*Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Page v. Parker*, 40 N. H. 59; *Dickenson v. Inhabitants*, 13 Gray, 550.) Eminent domain is the right of the people or government to take private property for public use. (Code Civ. Proc., sec. 1237; *Gilmer v. Lime Point*, 18 Cal. 229; *Beetman v. R. R. Co.*, 3 Paige, 45; 3 Story on Constitution, p. 117.) Statutes for the exercise of the right of eminent domain are strictly construed. (*Spring Valley W. W. v. San Mateo W. W.*, 64

Cal. 131; *Bensselaer etc. Co. v. Davis*, 43 N. Y. 146.) The power of eminent domain is to be strictly construed, (*San Francisco W. Co. v. Alameda W. Co.*, 36 Cal. 639.) To justify the exercise of the right, a necessity to invade the private domain for the benefit of the public must be clearly shown. (*Jordan v. Woodward*, 40 Me. 323; Angell on Watercourses, sec. 459; Lewis on Eminent Domain, sec. 393; *Paul v. Detroit*, 32 Mich. 108, 119.) Hence, if sufficient property have already been taken from the region of private domain and dedicated to supply the public use, more than that cannot be taken. More than is necessary would be mere cumulation, and such cumulation is never permitted. (*Spring Valley W. W. v. San Mateo W. W.*, 64 Cal. 133; *Southern Pacific R. R. Co. v. Raymond*, 53 Cal. 228; *Olmstead v. Proprietors*, 46 N. J. L. 495, 500; *Lecone v. Police Jury*, 20 La. Ann. 308.) In order to justify the taking, it is not sufficient to show that it is necessary in the carrying out of a given scheme. That the scheme itself is one necessary for the public use must also be established. (*People v. Brighton*, 20 Mich. 71; *Mansfield etc. Co. v. Clark*, 23 Mich. 519; *Grand Rapids etc. R. R. Co. v. Driele*, 24 Mich. 409; *Powers's Appeal*, 29 Mich. 509.) Whether the improvement was necessary, was a question for the jury. (*Houghton v. Huron Copper Min. Co.*, 57 Mich. 547.)

Fox & Kellogg, and *W. D. Storey*, for Respondent.

There was no error in the refusal of the court to give the instructions asked for by the defendant. The charge of the court must be taken as a whole. (*Davis v. Button*, 78 Cal. 247; *People v. Lee Chuck*, 78 Cal. 315.) The charge of the court, taken as a whole, is full, protects the rights of the defendants to the extreme limit of the law, and each and every sentence of it is supported by the decisions of this court, as will be seen by reference to the following cases and pages: *Crandall v. Woods*, 8 Cal. 141, 142; *Ferrea v. Knipe*, 28 Cal. 341; 87 Am. Dec. 128; *Ellis v. Tone*, 58 Cal. 289; *Lux v. Haggin*, 69 Cal. 255-259; *Learned v. Tangemen*, 65 Cal.

334; *Union Water Company v. Crary*, 25 Cal. 504; 85 Am. Dec. 145; *American Company v. Bradford*, 27 Cal. 361-367; *Davis v. Gale*, 32 Cal. 27; 91 Am. Dec. 554; *Hanson v. McCue*, 42 Cal. 310; 10 Am. Rep. 299; *Anaheim Water Co. v. Semi-tropic Water Co.*, 64 Cal. 185; *Feliz v. Los Angeles*, 58 Cal. 73; *Thomas v. England*, 71 Cal. 456; *Alta Land and Water Co. v. Hancock*, 85 Cal. 223, 224; 20 Am. St. Rep. 217. The court correctly laid down the law on the subject of necessity. (*City of Pasadena v. Stimson*, 91 Cal. 238; *State v. Mayor etc.*, 23 Atl. Rep. 129.) A municipal corporation has the right to acquire property by condemnation for any of the purposes mentioned in section 1238 of the Code of Civil Procedure. (*City of Pasadena v. Stimson*, 91 Cal. 238; *State v. Mayor etc.*, 23 Atl. Rep. 129.)

PATERSON, J.—This is an action to condemn the waters of Laguna Creek, a small stream in Santa Cruz County, for the purpose of supplying the wants of plaintiff and its inhabitants. The defendant Enright is the owner of a tract of land lying below the point of the proposed diversion, and bounded on the northwest for about three miles by the creek. The defendant Enright claims that there is neither any authority nor any necessity for the exercise of the power of eminent domain; but that if such authority exist, he is entitled to compensation for the injury he will sustain, not only as a riparian proprietor, but as a prior appropriator and owner by prescription. The jury found in favor of the plaintiff on the main issues, and assessed the defendant Enright's compensation at eight thousand dollars, and the damages to be paid to each of the other defendants who claimed some interest in the property at one dollar.

The defendants Enright and Sylva moved for a new trial, the motion was denied, and they have appealed from the order and from the judgment.

It may be conceded, for the purposes of this decision, that the charter of the city of Santa Cruz confers no authority upon the municipal authorities to condemn water

for the use of the inhabitants of the city. Its warrant for the exercise of the power is found in the constitution and general laws of the state. Section 6 of article XI. of the constitution provides that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." Section 1001 of the Civil Code provides that "any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner, or by proceedings had under the provisions of the Code of Civil Procedure." Section 1238 of the Code of Civil Procedure provides that the right of eminent domain may be exercised in behalf of the following uses, "3. . . . canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town."

These provisions of the codes are "general laws," applicable to municipal corporations which were formed before, as well as to those which were formed after, the adoption of the constitution of 1879. (*Thomason v. Ashworth*, 73 Cal. 73; *People v. Henshaw*, 76 Cal. 446; *Pasadena v. Stimson*, 91 Cal. 238.) In the case last cited, our chief justice, speaking for the whole court, said: "It follows, therefore, that under this general law, — general in the fullest and widest sense of the term, — any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure, acquire private property without the consent of the owner. . . . But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organization. They are the subject of general laws, applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons." Although the precise point to which these remarks were

addressed in that case was the right of the legislature to impose upon cities of the fifth and sixth classes the duty of making an effort to agree with the owner as a condition precedent to the exercise of the power of eminent domain, yet the principles there announced are as applicable to the questions before us herein. If section 1001 of the Civil Code and section 1238 of the Code of Civil Procedure are general laws for one purpose, they are general laws for all purposes within the scope of their provisions; and the act of March 19, 1889, which is also a general law, provides how indebtedness for such works may be incurred and paid by municipal corporations. (Stats. 1889, p. 399.)

The court did not err in refusing to give the fifth and sixth instructions proposed by the defendant relating to the question of necessity. The evidence shows that the waters of the creeks from which the Santa Cruz Water Company receives its supply are insufficient in quantity, and a portion of them inferior in quality. They are nearer the city than Laguna Creek, and in the winter season afford an abundant supply of water; but in the summer months a large portion of the city is left without water sufficient for domestic purposes, and the population of the city is steadily increasing. Distance is, of course, a matter to be considered, but it is not controlling.

One of the engineers testified as follows: "There are four elements to be considered in determining the availability of a stream for supplying a city: 1. Quality; 2. Quantity; 3. Elevation; and 4. Distance. The waters of the Laguna Creek are excellent in quality. Their quantity is abundant. Their elevation is sufficient; and their distance,—it is the nearest source of supply to said city, after Major's Creek and both branches of Branciforte Creek."

The instructions of the court on the questions as to the power to condemn, and the necessity claimed to exist, were full, clear, and correct, and, as there was no error in the rulings of the court in admitting or exclud-

ing evidence, we are clearly satisfied that the judgment, so far as this branch of the case is concerned, should be affirmed.

It is claimed that the court erred in instructing the jury that the defendant could not acquire any right in the waters of the creek by mere appropriation. This contention cannot be sustained. (*Alta Land Co. v. Hancock*, 85 Cal. 223; 20 Am. St. Rep. 217.) It does not appear whether the lands through which the stream ran at the time defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact. It is contended that the presumption of law is, that in 1873 the lands were public lands of the United States, and *Burdge v. Smith*, 14 Cal. 380, and *Smith v. Doe*, 15 Cal. 101, are cited in support of the proposition. We do not think such a presumption can be indulged in favor of the defendant upon his claim of right by appropriation. The decisions in the cases referred to were based upon the provision in the act of March 26, 1856, for the protection of settlers, and to quiet land titles, which reads as follows: "All lands in this state shall be deemed and regarded as public lands, until the legal title is shown to have passed from the government to private parties."

During the examination of Gushee, defendant's grantor, a notice signed by Gushee, and dated April 14, 1873, stating that said Gushee claimed the water flowing in Laguna Creek to the extent of 125 inches under a four-inch pressure, for irrigation and domestic purposes, was offered in evidence, and upon objection of the plaintiff, was excluded, to which ruling the defendant excepted. The defendants offered to show that the notice had been posted in a conspicuous place at the point where Gushee subsequently built his flume and diverted the waters of the creek, and that within ten days a copy of the notice was recorded. The offer was rejected, and the defendants again excepted. We think this ruling of the court

was erroneous. The notice was admissible on the question of title by prescription. It tended to show that defendant claimed the right to divert the water adversely to all other claimants. In view of the undisputed evidence, however, we do not see how the error could operate to the prejudice of the defendant. As stated by counsel himself, in discussing another proposition, "the case was such as to leave no room for any possible doubt on the part of the jury. The evidence upon the adverse character of the diversion and use of the water by the defendant and his predecessor, Gushee, for a period of over fifteen years, was all one way. There was no conflict on the subject, — nothing which could leave any room for doubt. The witness Gushee, the original owner, testified: 'The diversion of the water, for the purposes that I have mentioned, has been continued by me uninterruptedly from the time I commenced in 1873 or 1874 until I sold the land to Enright. . . . I diverted that water from the beginning, under a claim of right, openly and notoriously. All my neighbors knew of it, I suppose. No one ever objected to my doing so. I claimed that right as against everybody else on the stream.' The defendant Enright testified that 'he had continued to divert and use upon said land the waters of Laguna Creek, by means of the flume and ditch mentioned; that said use had been uninterrupted, open, notorious, under a claim of right against the whole world.' No witness whatever was called to contradict this, or to show that the use of the water was by permission, expressed or implied, or was otherwise than adverse." There is not a word of evidence in the record tending to impeach this statement. It is not claimed that Gushee diverted the water under a license from any one. Gushee stated that he had no grant from any owner of the land upon the stream to divert the water, nor any permission from any one to do so. Under these circumstances, the defendant was entitled to an instruction directing the jury to find that he had fully sustained by proof his allegation of title by adverse use, and it would have been

error if such an instruction had been refused. The evidence being all one way — there being no room for doubt, as stated — on the question of adverse use of the water, we think the ruling of the court could not possibly operate to the prejudice of the defendant. The evidence offered would have been superfluous; it could have added nothing to the case which the defendant had already made on that subject. The jury were fully and fairly instructed upon all of the questions involved in the defendant's title by prescription, and we must assume that they properly considered the evidence relating thereto, and included in their assessment of damages the value of defendant's prescriptive right.

We cannot say that the court erred in excluding the testimony of the witness Ray, called on behalf of the defendant. He was requested to give his opinion as an expert as to the effect of irrigation upon the lands owned by the defendant. Counsel for plaintiff objected to the question, on the ground that the witness was not shown to be competent to testify. It appeared that the experience of the witness had been confined to the county of Santa Clara, and that he had never been upon the tract of land owned by the defendant, except for a period of one day in the winter prior to the time of the trial. To entitle the witness to testify, it ought to have been shown that the conditions as to climate, soil, topography, and rainfall were the same in the mountains of Santa Cruz as they were in the southern part of Santa Clara County, where the witness resided. The court cannot take judicial notice of such matters.

We have carefully examined the instructions given to the jury, and while there are two or three sentences obnoxious to criticism, when considered independent of the context, we think the charge of the court fairly presented the law applicable to the questions involved, and that the jurors were not misled by the expressions criticized by appellant.

Judgment and order affirmed.

McFARLAND, J., SHARPSTEIN, J., DE HAVEN, J., and GAROUTTE, J., concurred.

HARRISON, J., did not participate in the foregoing decision.

Rehearing denied.

[No. 14403. In Bank.—June 18, 1892.]

THOMAS ALVARADO, APPELLANT, v. W. H. NORD-
HOLT ET AL., RESPONDENTS.

ADVERSE POSSESSION—CO-TENANCY—QUESTIONS OF FACT.—Whether a party, claiming title to land by adverse possession, entered into the possession acknowledging himself to be a co-tenant, or whether he entered claiming the whole title, and whether his possession thereafter was adverse and of such notoriety that his alleged co-tenants must be presumed to have known of his exclusive ownership, are questions of fact for the trial court to determine from all the circumstances.

ID.—EVIDENCE OF OUSTER OF CO-TENANT—ENTRY UNDER ADMINISTRATOR'S DEED—NOTICE OF EXCLUSIVE OWNERSHIP.—Evidence that the defendants in an action of ejectment, and their predecessors, received all the rents of the property, and paid all taxes assessed against it, for over twenty years, and paid all street-improvement assessments charged thereon, and that the predecessor of the defendants entered under an administrator's deed of the land, and always claimed to be the owner of the property, and that his claim was open and notorious, and generally known to the community, warrants the court in finding an ouster of alleged co-tenants, and that they had notice of his claims of exclusive ownership, and that his possession was adverse to them.

ID.—STATUTE OF LIMITATIONS—DISABILITY—INFANCY—SUSPENSION OF STATUTE—Where a person who could have maintained an action to recover her interest in land during her lifetime dies, the running of the statute of limitations is not suspended during the minority of one who claims the property under the decedent.

PATENT—EJECTMENT—EVIDENCE—OFFER OF PROOF—PUBLICATION OF NOTICE OF SURVEY AFTER PATENT—OBJECTIONS TO SURVEY.—An offer by the plaintiff, in an action of ejectment to recover land within the former pueblo of Los Angeles, to prove that there was no publication of notice of the survey and plat upon which was based the patent to the city of Los Angeles, under which the defendant claims, prior to the issuance of the patent, and that the United States surveyor-general published notice of the prior survey after the patent was issued, and that the city made objections to the survey, which were overruled, it being admitted that the city authorities did not then know of the issuance of the patent, and that they afterward demanded its delivery, is properly

rejected. Such evidence does not show a non-acceptance of the patent by the city, or that it did not pass the legal title, although a subsequent patent for the same land was issued and delivered to the city.

1D.—EFFECT OF PATENT—RECORD—VESTING OF TITLE—PRESUMPTION OF ACCEPTANCE.—When a United States patent is signed, sealed, and recorded in the records of the land-office, the title to the land therein described is transferred to the grantee, as far as the government is concerned, and its acceptance by the grantee will be conclusively presumed, unless, immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land-office.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Lee & Scott, for Appellant.

Nordholt entered into possession under the administrator's deed purporting to convey the interest of the widow in the whole lot, but that interest was an undivided half, as the property was owned by Alvarado during his marriage, and therefore presumed to be community property. (*Meyer v. Kinzer*, 12 Cal. 247; 73 Am. Dec. 538; *Fuller v. Ferguson*, 26 Cal. 546; *Tolman v. Smith*, 85 Cal. 280.) A person remaining in possession, after entering under a claim of title of which he is co-tenant with another, cannot deny the common source of title, nor defend himself by proving that the paramount title is in a third person. (Freeman on Cotenancy and Partition, secs. 152, 153; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696.) And his possession will inure to the benefit of his co-tenants out of possession, so as to ripen their right into a title, if it is in another; and it is immaterial whether the deed under which he enters does in fact pass any interest. (*Park Comm'rs v. Coleman*, 108 Ill. 591.) And where the person entering as tenant in common acquires a true title from a third person, such tenant in possession cannot use the title so obtained to keep the other out, but the latter is entitled to be let into possession, and then the former may make his title available by appropriate action. (*Olney v. Saw-*

yer, 54 Cal. 379; *Bornheimer v. Baldwin*, 42 Cal. 34; *Rego v. Van Pelt*, 65 Cal. 254.) Plaintiff and his predecessors in interest did not lose their title by abandonment, as the doctrine of abandonment only applies where there has been a mere naked possession without title. (*Ferris v. Coover*, 10 Cal. 631; *Davis v. Perley*, 30 Cal. 630; *Davenport v. Turpin*, 43 Cal. 602.) The fact of abandonment must be affirmatively shown, and the proof must be clear. (*Corning v. Troy etc.*, 40 N. Y. 191; *Moon v. Rollins*, 36 Cal. 333; 95 Am. Dec. 181; *Keane v. Cannovan*, 21 Cal. 293.) It was not necessary to prove an ouster, as the plaintiff's complaint alleged adverse exclusive possession and a refusal to allow plaintiff to enter, which was not denied, but on the contrary the answer repudiated the plaintiff's title. (Freeman on Cotenancy and Partition, sec. 292; *Greer v. Tripp*, 56 Cal. 212.) There was no evidence offered to show what claim Nordholt made when he first took possession, excepting what may be inferred from the fact that he went into possession of the lot after receiving the first deed. The law will presume that every man having a right of entry or possession enters or occupies according to his title. (Freeman on Cotenancy and Partition, secs. 221, 222, 241; *Bath v. Valdez*, 70 Cal. 350.) And to overturn this presumption, there must be clear proof to the contrary. (Freeman on Cotenancy and Partition, sec. 167.) The deed to Mrs. Nordholt vested the interest conveyed as community property, as the amendment of 1889 to section 164 of the Civil Code is not retroactive. (*Tolman v. Smith*, 85 Cal. 280.) An actual ouster was necessary in order to start the statute of limitations in motion against Nordholt's co-tenants. (Angell on Limitations, sec. 420; Freeman on Cotenancy and Partition, sec. 232; *Carpentier v. Webster*, 27 Cal. 524; *Seaton v. Son*, 32 Cal. 481; *Packard v. Johnson*, 51 Cal. 545; *Aguirre v. Alexander*, 58 Cal. 21; *Coleman v. Clements*, 23 Cal. 247; *Reading's Case*, 1 Salk. 392; 1 Coke, 199 b; *Van Bibber v. Frazier*, 17 Md. 436; *Marr v. Gillian*, 1 Cold. 488; *Camsau v. Campau*, 44 Mich. 31.) It is not sufficient that

Nordholt's possession was adverse; for there may be adverse holding by a tenant in common without an ouster, and likewise there may be an ouster without an adverse possession. Both must exist to start the statute. (*Miller v. Myers*, 46 Cal. 535; *Coleman v. Clements*, 23 Cal. 245; *Carpentier v. Webster*, 27 Cal. 524; *Greer v. Tripp*, 56 Cal. 209; *Packard v. Johnson*, 51 Cal. 545, 57 Cal. 180; *Aguirre v. Alexander*, 58 Cal. 21; *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Warfield v. Lindell*, 30 Mo. 272; 77 Am. Dec. 614.) The entry under a deed for the whole from a tenant in common to a stranger, where the grantor claims to be sole owner, is notice to the co-tenants out of possession of the adverse claim, and constitutes an ouster. (*Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Bath v. Valdez*, 70 Cal. 350.) But a deed from a tenant in common, purporting to convey only the interest of the grantor, has never been deemed sufficient to put the co-tenants upon inquiry as to the claim of the grantee entering under such a conveyance. (*Bath v. Valdez*, 70 Cal. 350; *Trenouth v. Gilbert*, 63 Cal. 404; *Freeman on Cotenancy and Partition*, sec. 225; *Edwards v. Bishop*, 4 N. Y. 61; *Purcell v. Wilson*, 4 Gratt. 16; *Holley v. Hawley*, 39 Vt. 525; 94 Am. Dec. 350; *Northrop v. Wright*, 24 Wend. 221; *Busch v. Huston*, 75 Ill. 343; *Van Bibber v. Frazier*, 17 Md. 436; *Hume v. Long*, 53 Iowa, 299.) The record of a deed is constructive notice only to subsequent purchasers and incumbrancers from the grantor; and where a recorded deed for the whole is taken by a tenant in common in possession, it is not notice to his co-tenants of an adverse claim. (*Leach v. Beatties*, 33 Vt. 199; *Page v. Branch*, 97 N. C. 97; *Holley v. Hawley*, 39 Vt. 525; 94 Am. Dec. 350. See also *Cloud v. Webb*, 4 Dev. 290; *Culver v. Rhodes*, 87 N. Y. 348; *Roman Catholic Archbishop of San Francisco v. Shipman*, 79 Cal. 295, 296.) Until the tenant out of possession has notice that the possession of his co-tenant has become hostile, it will be deemed, in law, to have been amicable, "notwithstanding the tenant in possession may, in fact, have been holding adversely." (*Miller v. Myers*, 46 Cal. 535.) In order to relieve the adverse

claimant from this rule or presumption of law, it is necessary for the court to find notice to the other joint owner, and this will never be done in the absence of actual notice, where there is bad faith shown. (*McCracken v. San Francisco*, 16 Cal. 636; *Wilson v. Atkinson*, 77 Cal. 485; 11 Am. St. Rep. 299; *Snydor v. Palmer*, 29 Wis. 249; *Austin v. Barrett*, 44 Iowa, 488; *Bender v. Stewart*, 75 Ind. 88.) We refer the court also to the following cases, as bearing upon the question of ouster and adverse claims: *Coleman v. Clements*, 28 Cal. 245; *Owen v. Morton*, 24 Cal. 373; *Carpentier v. Mendenhall*, 28 Cal. 484; 87 Am. Dec. 135; *Carpentier v. Webster*, 27 Cal. 524; *Carpentier v. Gardiner*, 29 Cal. 160; *Seaton v. Son*, 32 Cal. 481; *Greer v. Tripp*, 56 Cal. 209; *Aguirre v. Alexander*, 58 Cal. 21; *McNiel v. Congregational Society*, 66 Cal. 105; *Tully v. Tully*, 71 Cal. 341; *Watson v. Sutro*, 86 Cal. 500; *Jones v. Throckmorton*, 57 Cal. 368; *Roach v. Caraffa*, 85 Cal. 436; *McClure v. Colyear*, 80 Cal. 378; *Gri-der's Estate*, 81 Cal. 571; *Van Bibber v. Frazier*, 17 Md. 436; *Hart v. Gregg*, 10 Watts, 185; 36 Am. Dec. 166. The rule is, that a tenant in common cannot acquire title by adverse possession, unless there has been such an ouster of his co-tenants as to entitle them to bring ejectment against him. (*Day v. Davis*, 64 Miss. 253.) The long possession of Nordholt ought not to entitle his successors to any consideration, as he never purchased the whole property in good faith, and never believed that he was the owner of more than an undivided interest therein. (*Williams v. Sutton*, 43 Cal. 74. See also *Philips v. Gregg*, 10 Watts, 158; 36 Am. Dec. 158; *Bolton v. Hamilton*, 2 Watts & S. 295; 37 Am. Dec. 509; *Austin v. Barrett*, 44 Iowa, 488; *Sydnor v. Palmer*, 29 Wis. 249; *Kathan v. Rockwell*, 16 Hun, 90; *Culver v. Rhodes*, 87 N.Y. 348; *Busch v. Huston*, 75 Ill. 343; *Cooley v. Porter*, 24 W. Va. 125; *Tulloch v. Worrall*, 49 Pa. St. 133; *Challefoux v. Ducharme*, 4 Wis. 554; *Holley v. Hawley*, 39 Vt. 525; 94 Am. Dec. 350; *Purcell v. Wilson*, 4 Gratt. 16; *Edwards v. Bishop*, 4 N. Y. 61; *Roberts v. Morgan*, 30 Vt. 324; *Hunt v. Hunt*, 3 Met. 175; 37 Am. Dec. 130; *Cam-*

pau v. Campau, 44 Mich. 31.) One of Nordholt's co-tenants was a minor during the greater part of his occupation, and became of age within five years prior to the commencement of the action. The rule is, that an infant is not chargeable with notice of the adverse claim of his co-tenant, and the period of his infancy is not counted in determining whether the adverse possession has continued a sufficient length of time to justify the presumption of an ouster. (*Northrop v. Marquam*, 16 Or. 493.) A short possession prior to the death of the minor's ancestor is not sufficient proof of an adverse possession. (*Day v. Davis*, 64 Miss. 253.) It thus appearing that there was a minor tenant in common whose rights were not barred by Nordholt's possession, and the latter being a co-tenant with him, his minority protected all his co-tenants out of possession, and therefore the statute of limitations did not begin to run against plaintiff or any of his grantors until within five years prior to the commencement of the action. (*McGee v. Hall*, 26 S. C. 179; *Lahiffe v. Smart*, 1 Bail. 192; *Faysoux v. Prather*, 1 Nott & McC. 298; 9 Am. Dec. 691; *Grey v. Givens*, 2 Hill Ch. 513.) The city refused to accept the patent of August 9, 1866, by protesting against the survey, which had excluded several hundred acres of land confirmed to it. This patent, therefore, never having been actually delivered, and having been issued contrary to law, and having also been followed by the issuance and delivery of another patent in strict conformity with the statute, was void, and the true patent was that of August 4, 1875. (*Le Roy v. Clayton*, 2 Saw. 495; *Le Roy v. Jamison*, 3 Saw. 369.)

Stephen M. White, and Shinn, Edgerton & Ling, for Respondents.

The plaintiff will not, in any event, be entitled to recover, unless he establishes, *prima facie*, a valid title to the property. (*Busenius v. Coffee*, 14 Cal. 93.) When the plaintiff relies upon his title as the basis of his right to recover possession, and fails to establish it, judgment

is properly rendered against him. (*Talbert v. Hopper*, 42 Cal. 397.) Although a prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder, or a person subsequently entering without lawful right, if the action to recover the prior possession be brought within a reasonable time, yet if there has been delay in bringing the suit, the *animus revertendi* must be shown, and the delay must be satisfactorily accounted for, or the possessor may be deemed to have abandoned his claim to the possession. (Tyler on Ejectment, 723.) Where no title appears on either side, a prior possession, though short of the statutory bar, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right, and not voluntarily abandoned. (*Bledsoe v. Simms*, 53 Mo. 309; *Bequette v. Caulfield*, 4 Cal. 278; 60 Am. Dec. 615.) The question of abandonment was peculiarly a matter for the determination of the judge who tried the case. It involved an examination as to the intention of the plaintiff's predecessors when they left the property in 1855. This issue was determined adversely to appellant, and such determination is, under all the circumstances, final. (*Keane v. Cannovan*, 21 Cal. 303; *Bell v. Red Rock Co.*, 36 Cal. 217; *Moon v. Rollins*, 36 Cal. 337; 95 Am. Dec. 181.) As the evidence showed that Nordholt had been in possession of the land, either personally or through his successors, and that he and his heirs had received all the rents of the property in controversy, from the date of the administrator's deed to the time of trial, and had paid all taxes, a sufficient notice of the adverse claim was proven. (Freeman on Cotenancy and Partition, sec. 242; *Bath v. Valdez*, 70 Cal. 359; *Oglesby v. Hollister*, 76 Cal. 141; 9 Am. St. Rep. 177; *Packard v. Moss*, 68 Cal. 123; *Lefavour v. Homan*, 3 Allen, 354; *Frederick v. Gray*, 10 Serg. & R. 182; *Kayser v. Evans*, 30 Pa. St. 509; *Hubbard v. Wood*, 1 Sneed, 286; *Dikeman v. Parrish*, 6 Pa. St. 227; 47 Am. Dec. 455; *Jackson v. Whitbeck*, 6 Cow. 633; 16 Am. Dec. 454; *Harmon v. James*, 7 Sines & M. 111;

45 Am. Dec. 296; *Bryan v. Atwater*, 5 Day, 188; 5 Am. Dec. 136.) Where one enters and takes the profits exclusively and continuously for a long period, under circumstances which indicate a denial of the right in another to receive them, an ouster may be presumed. (Buswell on Limitations, 417; *Sydnor v. Palmer*, 29 Wis. 226; *Cain v. Furlow*, 47 Ga. 675; *Peaceable v. Read*, 1 East, 568.) Sole possession of property incapable of actual division or separate occupancy by one co-tenant is an ouster as to the other, and entitles the latter thereafter to have his share of the rents and profits. (*Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725.) Although, as a general rule, entry of one tenant in common will inure to the benefit of all, yet he may so enter and hold as to render his entry and possession adverse, and an ouster of co-tenants; and where a vendee of one tenant in common sets up a claim in his own right to the whole tract of land, and enters and holds possession openly and continuously for more than the statutory period, his possession is adverse, and a recovery by the other tenants in common is barred, although they had no actual notice of the adverse character of the possession. (*Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579.) Although the possession of a tenant in common is not necessarily adverse to his co-tenant, it may be regarded as such where one holds possession under a claim of entire ownership, and his co-tenant has knowledge of it. It is not necessary to show by direct and pointed evidence that the co-tenant has such knowledge; it is sufficient if it is not shown otherwise, and the circumstances are such that it may reasonably be presumed that the co-tenant has such knowledge. (*Knowles v. Brown*, 69 Iowa, 11.) Whether the plaintiff had sufficient notice to put him on his guard was a question for the court. (*Renton v. Monnier*, 77 Cal. 456.) The possession of the whole of the property by Nordholt, and the appropriation of all the rents and profits, were sufficient evidences of hostile occupancy, and cast upon plaintiff the burden of showing that he either prosecuted an inquiry,

or that the condition of things was such that an investigation would have thrown no light upon the subject. Not having pursued such inquiry, he is chargeable with notice. (*Dreyfus v. Hirt*, 82 Cal. 626; *Wade on Notice*, secs. 11, 296, and authorities cited.) The statute of limitations is no defense here. When once the statute commences to operate, it will continue to run, regardless of any intervening disability. (*Wood on Limitations*, sec. 6; *Buswell on Limitations*, sec. 372.) Where a person in whose favor a cause of action for the recovery of real estate exists, and who is under no disability, dies, the statute of limitations does not cease running against those to whom the property is devised or descends, notwithstanding their disability at that time. The disability must exist at the time the right of action first accrues. (*McLeran v. Benton*, 73 Cal. 329, 344; 2 Am. St. Rep. 814.) When the statute of limitations commences running in the life of the decedent, it will not be suspended by his death until administration is granted on his estate. For it is a general principle of limitations that, after the cause of action has once accrued, subsequent accruing disabilities do not stop the running of the statute. (See note to *Miller v. Surls*, 65 Am. Dec. 596, and numerous authorities cited; *Grether v. Clark*, 75 Iowa, 383; 9 Am. St. Rep. 491; *Chancey v. Powell*, 103 N. C. 159; *Frederick v. Williams*, 103 N. C. 189.) Where one of the tenants in common is barred, all are barred, notwithstanding individual instances of disability. (*Freeman on Cotenancy and Partition*, sec. 378; *Buswell on Limitations*, sec. 126. See also *Moore v. Armstrong*, 10 Ohio, 11; 36 Am. Dec. 63.) There was no error in excluding the evidence offered by appellant for the purpose of defeating the patent of Los Angeles city, issued in 1866. It is immaterial that the patent does not recite that the several acts, which were required by law to be done in order to justify the action of the officers of the land department, were in fact done. It is enough that those officers acted. Their decision was the mere exercise of a power confided to them. They operated within their jurisdiction; hence

what they did is conclusive, so far as collateral attack is concerned. (*Houston v. San Francisco*, 47 Fed. Rep. 337; *Los Angeles Farming etc. Co. v. Hoff*, 48 Fed. Rep. 340; *Knight v. United Land Ass'n*, 142 U. S. 161; *United States v. Schurz*, 102 U. S. 378; *Levey v. Stocklager*, 129 U. S. 477; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 302; *Miller v. Ellis*, 51 Cal. 73; *Eltzroth v. Ryan*, 89 Cal. 139; *De Guyer v. Banning*, 91 Cal. 400.)

DE HAVEN, J. — Action to recover possession of an undivided interest in a certain lot in the city of Los Angeles, which plaintiff claims to own in common with four of the defendants, the other defendants being tenants of these four.

The plaintiff claims title to a portion of the interest sought to be recovered by him by inheritance from his grandfather, Francisco Javier Alvarado, and to the remaining portion by purchase from certain heirs of the same person.

The answer denied plaintiff's alleged ownership, and also contained a plea of the statute of limitations.

The court found that plaintiff was not the owner of any interest in the property, and also that his cause of action is barred by section 318 of the Code of Civil Procedure, and thereupon judgment was entered in favor of defendants.

The plaintiff insists that the findings of the court are not sustained by the evidence.

The land in controversy is within the limits of the former pueblo of Los Angeles. No written evidence of title in plaintiff's grandfather was produced, but it was shown that he occupied the premises as a house-lot from 1817 until the date of his death in 1831, and that his widow continued in the occupation thereof until her death in 1851. It was also proven that there is not to be found in the archives of the city of Los Angeles, the successor to the pueblo, any record of titles or grants made by the pueblo prior to 1828, and that there are no formal municipal records of the pueblo of a date prior

to 1832. If it should be assumed that these facts are sufficient upon which to base the presumption contended for by plaintiff, that the pueblo of Los Angeles did, in fact, grant to his grandfather the land in controversy, and that the written evidence thereof had been lost or destroyed, still if the court was right in its findings that defendants have acquired title by adverse possession, the judgment must be affirmed, and this question we proceed to consider.

As we understand this record, the grandfather of plaintiff left surviving him a widow, ten children, and grandchildren of a deceased daughter. The widow with some of her children continued to occupy the land in controversy from the death of her husband in 1831 until her own death in 1851. Proceedings for administration upon her estate were commenced in 1859, and the land was appraised as property belonging to it, and was sold by the administrator of said estate to one William Nordholt, and this sale being confirmed by the probate court, the said Nordholt received the administrator's deed therefor on February 14, 1866, and thereafter continued in possession of the land so conveyed until his death in 1885, at which time the defendants succeeded to his title. It is claimed by appellant that as the widow of his grandfather was only the owner of an undivided interest in this land at the time of her death, her children and grandchildren having succeeded to the remaining portion of her husband's estate, the effect of the administrator's deed was only to convey such interest as she had, and that said Nordholt thereupon became a tenant in common with the children of such widow, the remaining heirs of the elder Alvarado. Conceding this to be so, we think the evidence was sufficient to justify the court in finding that said Nordholt entered into possession, and thereafter, until his death, continued to hold the same, claiming the whole of said land as his own, and to show an ouster of his co-tenants within the rule announced by this court in the cases of *Unger v. Mooney*, 63 Cal. 586;

49 Am. Rep. 100; *Bath v. Valdez*, 70 Cal. 350; and *Winterburn v. Chambers*, 91 Cal. 170.

Whether Nordholt entered into possession, acknowledging himself as a co-tenant of those under whom plaintiff claims, or whether he entered claiming the whole title, and whether his possession thereafter was adverse, and of such notoriety that his alleged co-tenants must, in the nature of things, be presumed to have known of his claim of exclusive ownership, were questions of fact to be determined by the lower court upon a view of all the circumstances in evidence.

It was admitted upon the trial that from the date of the administrator's deed referred to down to the commencement of this action, the said Nordholt, and defendants who have succeeded to his title, received all the rents of the property, and paid all taxes which have been assessed against it. There was also evidence tending to show that all street-improvement assessments charged against said property had been paid by defendants or their predecessors. The land is within two hundred yards of the business center of the city, and the record does not show that the plaintiff, or any of those to whose alleged rights he has succeeded, ever made any claim for this property until some time in 1884.

Upon these facts, and other evidence tending to show that Nordholt always claimed to be the owner of the property, that this claim was open and notorious, and generally known to the community, the court was warranted in finding that his alleged co-tenants had notice of his claim of exclusive ownership, and that his possession was adverse to them.

The plaintiff himself attained his majority within five years before the commencement of this action, but as his mother, under whom he claims, lived for something more than a year after Nordholt took possession under his deed, and could have maintained an action to recover her interest in the land during her lifetime, the running of the statute of limitations was not suspended during

the minority of plaintiff. (*McLeran v. Benton*, 73 Cal. 344.)

The court did not err in its ruling on plaintiff's offer to prove that there was no publication of notice of the survey and plat upon which was based the patent to the city of Los Angeles of August 9, 1866, prior to the issuance of that patent, and in excluding proof of the other matters contained in plaintiff's offer. In the case of *Cruz v. Martinez*, 53 Cal. 239, this court substantially passed upon the same question, and held such proof inadmissible, saying: "The patent to the city of Los Angeles, bearing date the ninth day of August, 1866, having been duly signed and recorded in the proper book in the general land-office, vested in the city the legal title to the lands therein described."

We see no material difference between the facts contained in plaintiff's offer and those before the court in that case. The fact offered to be shown by plaintiff, to the effect that after the issuance of the patent of August 9, 1866, the United States surveyor-general published notice of the prior survey upon which such patent was in fact based, and that the city of Los Angeles then filed objections to such survey, which were overruled, is not sufficient to show that such patent was rejected by the city, or that it did not convey the legal title, or that it was recalled and canceled with the consent of the city. In fact, we do not understand that it is claimed, or that plaintiff offered to show, that such patent was in fact recalled or canceled. In addition to this, plaintiff's offer contained an admission that at the time the city filed its objections to such survey, "its common council, mayor, and authorities" did not know of the issuance of the prior patent, and never heard of the same, "until after the execution of said patent of August 4, 1875; but said corporation, in January, 1876, demanded from said commissioner the delivery of said patent of 1866."

The rule in regard to a United States patent is, that when it is signed, sealed, and recorded in the records of the land-office, then, so far as the government is con-

cerned, the title to the land therein described has been transferred to the grantee, and "its acceptance by the grantee will then be conclusively presumed, unless, immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land-office." (*Leroy v. Jamison*, 3 Saw. 391; *Case of Mutelle*, 3 Op. Att'y-Gen. 654.)

It is very apparent that under this rule the matters offered to be proven by plaintiff were not sufficient to show that the patent of August 9, 1866, did not vest in the city of Los Angeles the title to the land therein described, at its date, or that such title was not acquired by the city until the issuance to it by the United States of the subsequent patent for the same land on August 4, 1875.

There are no other assignments of error which require special discussion.

Judgment and order affirmed.

SHARPSTEIN, J., McFARLAND, J., HARRISON, J., PATTERSON, J., and GAROUTTE, J., concurred.

Rehearing denied.

[No. 13683. In Bank.—June 13, 1892.]

HENRY L. TATUM ET AL., RESPONDENTS, v. E. ROSENTHAL ET AL., APPELLANTS.

CORPORATIONS—SUBSCRIPTIONS TO STOCK—CREDITOR'S BILL—PLEADING—INDEBTEDNESS OF CORPORATION—CONCLUSIVENESS OF JUDGMENT.—A judgment against a corporation establishes its liability conclusively until reversed in a direct proceeding, and concludes the stockholders in an action against them in the nature of a creditor's bill, to compel them to pay in the unpaid portion of their subscriptions to the capital stock, toward the satisfaction of the judgment obtained; and it is not necessary that the complaint in such action should allege the indebtedness upon which the judgment was recovered.

INSOLVENCY OF CORPORATION—SUFFICIENCY OF COMPLAINT—NON-JOINDER OF CREDITORS—GENERAL DEMURRER—ANSWER.—A complaint in an action in the nature of a creditor's bill to compel the subscribers to the capital stock of an insolvent corporation to account
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for and pay in the unpaid portion of their subscriptions to the satisfaction of a judgment obtained against the corporation, which alleges the existence of the judgment debt, the insolvency of the corporation, that the subscribers owe on their unpaid subscriptions, and that the execution issuing on the judgment has been returned wholly unsatisfied, but which does not show upon its face that there are any other creditors of the corporation, states a cause of action, although it does not state that the proceedings are for the benefit of all the creditors, and the question of defect in the pleading, or of non-joinder of other creditors, cannot be raised upon general demurrer to such complaint, but can only be pleaded by answer.

LD.—RIGHT OF JUDGMENT CREDITOR.—A judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may, alone or with other judgment creditors, file a bill against persons holding property of the debtor which cannot be reached by execution.

LD.—DIVISION OF FUND—ACTION BY SINGLE CREDITOR—DECREE FOR BENEFIT OF ALL.—Where a fund can only be divided satisfactorily among a certain class of persons, the decree must be so framed that all of them may be brought in for their distributive shares, but even then the bill may often be filed by any one of them on his own behalf. It is only when it subsequently appears to the court that a distribution must be made that a decree will be made for the benefit of all.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion.

Whitworth & Shurtleff, for Appellants.

In order for plaintiffs to recover, it is essential for them to allege the indebtedness upon which the judgment set out in their complaint was recovered. (*McMahon v. Macy*, 51 N. Y. 155; *Strong v. Wheaton*, 38 Barb. 616.) This is an equitable action,—an ordinary creditor's bill,—and cannot be maintained by a single creditor, unless he alleges in his complaint that the action is brought on behalf of himself and all other creditors of the corporation who might choose to come in and seek relief by it. There is no such allegation in plaintiff's complaint, neither is there an allegation that the plaintiffs are the sole creditors of the corporation. (*Patterson v. Lynde*, 106 U. S. 519. See also *Terry v. Tubman*, 92 U. S. 150; *Hatch v. Dana*, 101 U. S. 205; *Handley v. Stutz*, 137 U. S. 366; *Adler v. Wisconsin Patent Brick Mfg. Co.*, 13 Wis. 57; *Wetherbee v. Baker*, 35 N. J. Eq. 501,

506; *Bickley v. Schlag*, 20 Atl. Rep. 250.) The failure of the plaintiffs to allege that the action was brought in behalf of all the creditors of the corporation renders this an action at law, and therefore the court below had no jurisdiction. (*Derby v. Stevens*, 64 Cal. 287; *Hyman v. Coleman*, 82 Cal. 650.)

George A. Rankin, for Respondents.

The demurrer does not raise the points on which appellants rely. A defect or misjoinder of parties plaintiff is, of course, a ground for demurrer (Code Civ. Proc., sec. 430), which is waived unless taken advantage of on demurrer or by answer. (Code Civ. Proc., sec. 434.) So held in all actions against stockholders of a corporation. (*Faymonville v. McCollough*, 59 Cal. 285. See also *Rowe v. Chandler*, 1 Cal. 168; *People v. Frisbie*, 18 Cal. 402; *Gillam v. Sigman*, 29 Cal. 640; *Hastings v. Stark*, 36 Cal. 122.) It is also so held in case of non-joinder of parties plaintiff. (*Wendt v. Ross*, 33 Cal. 656.) It was not necessary to allege the original indebtedness in the action against the stockholders. (Thompson on Liability of Stockholders, secs. 329, 330.) It was not essential that all the creditors, presuming there were others than the plaintiff, should have been joined. (Thompson on Liability of Stockholders, sec. 351.) In the leading case in this state (*Harmon v. Page*, 62 Cal. 448), the suit was by one creditor, and nothing was said about the necessity of joining others.

FOOTE, C. — This action is in the nature of a creditor's bill to compel certain subscribers to the capital stock of an insolvent corporation to account for and pay in the unpaid portion of their subscriptions, to the satisfaction, as far as it may, of a judgment obtained against the corporation, upon which execution had been returned wholly unsatisfied.

Demurrers were filed to the complaint, which alleged, among other matters, that the complaint did not state facts sufficient to show a cause of action. The demur-

ers were overruled and answers were filed. A trial was had, which resulted in a judgment for plaintiffs against certain of the defendants. Some of the latter have appealed from the judgment, and the only points made in their briefs for its reversal are:—

1. That the complaint does not allege the indebtedness upon which the judgment set out in the complaint was recovered. As to this, it can be said that when this judgment was rendered against the corporation, it established its liability conclusively, so far as any judgment can, to pay the debt. It concluded the stockholder, in a case like this, who was in privity with the corporation, and is valid until reversed in a direct proceeding. (Thompson on Liability of Stockholders, sec. 329.)

This being so, we can perceive no good reason why it should be alleged that this valid and subsisting judgment was also founded upon a valid and subsisting debt.

2. It is claimed that in all bills of the kind here involved, it is essential that it should be alleged in the complaint that the proceedings are for the benefit of all the creditors of the insolvent corporation.

It is true that in actions of this sort, the fund realized from the payments by the subscribers to the capital stock was, in equity, equally a fund belonging to all the creditors, and in the distribution of it, if it appeared to the court that there were other creditors than those instituting the suit, it would be the duty of that tribunal to distribute to them their *pro rata* share of the fund.

And this rule proceeds upon the idea that no one creditor can secure the payment of his debt to the exclusion of other creditors. (*Handley v. Stutz*, 137 U. S. 369.)

But we do not think that under our statute, where the facts are as stated here, viz., that the judgment debt exists, that the corporation is insolvent, that the subscribers owe a certain sum on their unpaid subscriptions, that the execution issuing on the judgment has been returned wholly unsatisfied, and it does not appear from the complaint that there are any other creditors of the corporation, that it should be held, because of the defect

of or misjoinder of other creditors, or the failure to allege that the complaint is filed for the benefit of all creditors, that upon a general demurrer, such as here involved, the complaint is bad.

It would seem that such an objection must be taken by special demurrer, as for a defect or misjoinder of parties plaintiff, where it appears from the face of the complaint, as it does not here, that there are other creditors who should be made parties; or by an answer, if there are other creditors who should be joined. (Code Civ. Proc., secs. 430, 433.) And if this be not done, the defect or misjoinder is waived. (Code Civ. Proc., sec. 434.)

None of the cases cited to us involve this precise point; but Mr. Thompson, in his work on the Liability of Stockholders, has this to say upon the question, at section 351: "It has long been settled that a judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may, alone or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution."

This doctrine seems to be sustained by good authority (*Marsh v. Burroughs*, 1 Woods, 467), where it is also said: "Where a case exists in which a fund can only be divided satisfactorily among a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then, the bill may often be filed by any one of them on his own behalf. It is only when it appears to the court, by the subsequent pleadings, or otherwise that a distribution must be made (as where an executor pleads want of sufficient assets), that a decree will be made for the benefit of all."

The party objecting here is not a creditor who says he has not been made a party, nor does it appear that any such has asked to be made a party, or that there are any other creditors.

It would seem, therefore, that if the defendants were

of the opinion that other parties should be joined as plaintiffs, that they should, under our statute, and under the complaint, have pleaded by answer the non-joinder of parties plaintiff.

We are strengthened in our view of this matter from the fact that in *Harmon v. Page*, 62 Cal. 448, where one creditor alone filed a bill, there did not seem to be any question made but what he could bring the action alone, and it was said: "It appears to us to be well settled that a suit such as was instituted by the plaintiff properly lies in a court of equity, unaffected by any remedy the creditor may have under the provisions of the constitution and the statute."

We perceive no merits in the points made, and advise that the judgment be affirmed.

VANOLIEF, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[Nos. 13116, 13309. In Bank.—June 18, 1892.]

F. G. BERRY ET AL., RESPONDENTS, v. E. H. KOWALSKY, APPELLANT.

OPTION FOR SALE OF WHEAT—ACTION FOR BREACH—PLEADING—DEMUR-
RER.—A complaint alleging that the defendant executed a contract with the plaintiffs, setting out a copy of the contract, which acknowledged the receipt of a consideration of one hundred dollars, for which the defendant allowed the agent of the plaintiffs the "privilege" to deliver to the defendant, within thirty days, five hundred tons of 8/87 wheat, "at one dollar and eighty cents per cental"; and which further alleges that within thirty days the plaintiffs tendered a delivery of the wheat and demanded payment of the price, which the defendant refused to pay,—states a cause of action for the breach of an alleged conditional agreement to buy the wheat at plaintiffs' option, and is sufficient, as against a general demurrer.

10. — CONTRACT PLEADED IN HAEC VERBA — MEANING OF WORDS OR ABBRE-
VIATIONS — EVIDENCE — PLEADING — SPECIAL DEMURRER. — Where a written agreement is set out in full in a pleading, the meaning of words or abbreviations therein may be proved on the trial, for the purpose of enabling the court to interpret the words, and the oral evidence as to

their meaning need not be stated in the pleading, nor do abbreviations contained in the contract render the pleading liable to special demurrer.

ID.—SURPLUSAGE.—Where a complete contract is expressed without abbreviations used therein, they may be disregarded as surplusage, if they are meaningless.

ID.—DESCRIPTION OF WHEAT—ABBREVIATIONS—SPECIAL DEMURRER.—The words or abbreviations, "S/87 wheat," cannot be said, upon a special demurrer to the pleading, to be unintelligible or meaningless, nor can it be said that their use renders the pleading ambiguous or uncertain.

ID.—EVIDENCE—MEANING OF ABBREVIATIONS—PRINTED MATTER—EXPLANATION OF CONTRACT—RULES OF BOARD.—Where printed matter, not described in the complaint, composed of extracts from the rules of the Produce Exchange and Call Board of San Francisco, appeared above the written contract pleaded, and it was testified by some of the witnesses that the phrase "S/87 wheat," used in the written contract, meant that the seller was to have the season of 1887 in which to complete his contract, and that the wheat should be "number one white wheat," and there was also testimony that the phrase meant that the wheat was not to be delivered, but that the seller was simply to produce "call-board contracts" for the wheat, evidence should be admitted to show whether the printed matter above the manuscript was a part of the contract, or whether it should be considered as a "board contract," or whether the phrase had any other meaning than that given to it by such board, and what that meaning is, and also to show what are the rules and regulations of the stock and exchange board, and it is error to exclude such evidence.

APPEALS from a judgment of the Superior Court of the city and county of San Francisco from an order denying a new trial.

The facts are stated in the opinion of the court.

Crittenden Thornton, and *F. H. Merzbach*, for Appellant.

D. H. Whittemore, and *Whittemore & Sears*, for Respondents.

The COURT.—"There are two appeals in this case, upon distinct records. No. 13116 is from the final judgment, and upon the judgment roll. No. 13309 is from an order denying defendant's motion for a new trial, upon a record consisting of a statement of the case in addition to the judgment roll.

"On the appeal from the judgment, it is contended that the court erred in overruling the defendant's de-

murrer to the complaint, and that the findings do not support the judgment. On the appeal from the order, the errors assigned are errors of law occurring at the trial.

"The following is a copy of the verified complaint:—

"The said plaintiffs complain of the said defendant, and for cause of action herein allege:—

"That on the fifteenth day of July, 1887, the plaintiffs paid to defendant the sum of one hundred dollars for the right and privilege of delivering to defendant five hundred tons of wheat at any time within thirty days from said fifteenth day of July, at the rate of one dollar and eighty cents per cental; said contract is in the following words and figures, to wit:—

"SAN FRANCISCO, JULY 15, 1887.

"Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me at any time within thirty days from date five hundred tons S/87 wheat, at one dollar and eighty cents per cental.

"E. H. KOWALSKY.

"That said contract was made in the name of A. Gerberding, as the agent of plaintiffs, but the plaintiffs were and still are the real parties in interest.

"That said plaintiffs, on the thirteenth day of August, 1887, in the said city and county of San Francisco, at the office of said defendant, tendered the delivery of said five hundred tons of wheat to said defendant, and performed all the conditions on their part under said contract. Said plaintiffs then and there demanded from said defendant the sum of eighteen thousand dollars, payment as the price of said wheat according to said contract; that said defendant denied having purchased said wheat, and refused to pay for said wheat, to the damage of plaintiffs in the sum of eighteen thousand dollars.

"That said plaintiffs made said contract with said defendant in good faith, for the purpose of delivering said wheat to said defendant, and had said wheat in

warehouse in San Francisco for the purpose of delivering the same on said contract to said defendant.

"Wherefore plaintiffs pray for judgment against said defendant, in the sum of eighteen thousand dollars, interest, and costs of suit, and for such other and further relief as justice may require.

"WHITTEMORE & SEARS,

"Att'ys for Plaintiff."

"This complaint was demurred to, on the ground,—
1. That it is ambiguous, unintelligible, and uncertain, in that 'no meaning is alleged of the words "S/87," in the contract'; and 2. That the defendant does not state facts sufficient to constitute a cause of action.

"The alleged contract is not, does not purport to be, and is not alleged to be an agreement to 'sell and buy'; nor an agreement on the part of the plaintiffs to sell wheat at any time. It imposes upon the plaintiffs no obligation to be performed by them. If it be a valid contract, it is an agreement by the defendant, for an executed consideration, to buy and accept delivery of, from the plaintiffs, a certain quantity of wheat, within a certain period of time, for a certain price, at the option of the plaintiffs, and to pay plaintiffs the price therefor. (Civ. Code, secs. 1726-1730; Wharton on Contracts, sec. 453 a.) Nor is the action brought to recover the price or value of wheat 'sold and delivered,' or 'bargained and sold,' but to recover damages for defendant's breach of his alleged conditional agreement to buy the wheat at plaintiffs' option.

"1. As against a general demurrer, I think the facts expressed and implied in the complaint *barely* constitute a cause of action. The written instrument set out purports to have been signed by the defendant, and it is designated as the contract for the breach of which (afterwards alleged) the action is brought. This implies that it was executed by the defendant. The instrument admits the receipt of a consideration of one hundred dollars, for which defendant 'allows' (gives) plaintiffs the 'privilege' (option) to deliver (or not) to defendant,

within thirty days, five hundred tons of wheat, 'at (the price of) one dollar and eighty cents per cental.' The giving of the privilege to deliver the wheat to defendant *at a certain price* implies that he will receive and pay for it the price specified. The foregoing, I think, is the only admissible construction of the instrument as pleaded. If it will not bear this construction, it can have no effect as an agreement. As a breach of this agreement, it is alleged that within thirty days the plaintiffs tendered a delivery of the wheat and demanded payment of the price, thus creating the condition upon which defendant's liability depended, and that defendant refused to pay the price. This shows a breach of the agreement, for which the plaintiffs were entitled to such damages as proximately resulted therefrom.

"2. The grounds of the special demurrer — that the 'complaint is ambiguous, unintelligible, and uncertain' — do not appear on the face of the complaint. The words, or abbreviations, 'S/87,' appear to have been used as descriptive of the wheat, and to require oral evidence of their customary meaning in the business of dealing in wheat; but such oral evidence need not be stated in a pleading in which the written agreement is set out *in hæc verba*. The meaning may be proved on the trial for the purpose of enabling the court to interpret the words. (Civ. Code, secs. 1636, 1644-1646; *Callahan v. Stanley*, 57 Cal. 476.) Had it appeared on the face of the complaint, that even with the aid of parol evidence, the words 'S/87,' as used, were meaningless, and that a complete contract was expressed without them, they might have been disregarded as surplusage (*Harrison v. McCormick*, 89 Cal. 327); and certainly a complete contract is expressed without them. But it does not appear that, read in the light of admissible oral evidence, they are meaningless or unintelligible. So read, they may have a certain unambiguous meaning descriptive of the subject of the contract. Therefore the court could not see on the trial of the demurrer that those words were

unintelligible, or that their use rendered the complaint ambiguous or uncertain.

"3. The execution of the contract and the breach thereof, as alleged, are found as facts. Therefore the findings support the judgment.

"4. The contract as set out in the complaint being denied, it appears by the statement on motion for new trial that to prove the contract plaintiffs offered in evidence a paper on which was written the alleged contract as pleaded. Above the manuscript, and on the same paper, was printed matter composed of what was admitted to be extracts from the rules of the Produce Exchange and Call Board of San Francisco. The paper was objected to by counsel for defendant, on the ground that it varied from the contract as pleaded, the printed matter not being set out in the complaint. Thereupon for the apparent purpose of proving that the printed matter was no part of the contract, and that the 'contract was entirely independent of the printed heading; the plaintiff Berry on behalf of plaintiffs, testified to the circumstances under which the contract was made, and to what he claimed to have been all the verbal negotiations—all that was said by each party—preceding and leading up to the signing of the written contract, which he said was drawn by him according to the verbal understanding. He was further permitted to testify against the objection of defendant's counsel, that the 'contract was drawn independent of any connection with what is known as the Produce Exchange. . . . I was not figuring on the contract on the board. It was business outside. . . . I never read the printed matter on the top of the contract. It had nothing whatever to do with the contract. It is the written portion of this piece of paper that constitutes the entire contract between myself and the defendant.'

"F. J. Bonney, a witness for the defendant, testified that he was a farmer, and was a member of the Produce Exchange and Call Board on or about July 15, 1887, and was somewhat familiar with the rules thereof, and that

he was present when the contract in suit was made, and heard the preliminary talk between the parties, but was not present when defendant signed the contract. Thereupon defendant's counsel asked the witness the following questions, each of which was objected to, on the ground that the effect of the answer thereto would be to vary the written contract; and the objection to each question was sustained by the court, defendant duly excepting.

"Q. Was there any reference had in the conversation between these parties to what was known as the call-board contract?

"Q. Was anything said about the contract, which was to be entered into between the parties, being governed, or to be complied with, or performed under the rules of the San Francisco Produce Exchange and Call Board?

"Q. Was the term "board contract" used in reference to the contract proposed to be executed by them in regard to the dealing in wheat upon which they were entering?

"The defendant's counsel also offered in evidence all the rules and regulations of the Produce and Exchange Call Board, but upon objection by plaintiffs' counsel they were excluded by the court.

"It appears that Gerberding (in whose name the contract was made) was a member of the exchange board at the date of the contract. The defendant at the same time owned a seat in the board, but was not then occupying it, having leased it temporarily to another person. The plaintiff, Berry, had formerly been a member of the board.

"As to whether, under the facts and circumstances disclosed by the evidence, the contract could properly be considered a 'board contract,' and as to what extent, if at all, it was governed or affected by the rules and customs of the board, the testimony was conflicting."

(The foregoing is adopted from the opinion of Commissioner Vancielief, delivered in Department.)

It is testified that the phrase "S/87 wheat," used in the contract sued on, is an abbreviation which origi-

nated in the call board, where, from the necessities of business, such a phrase is understood to mean what it would take quite a number of words to express in detail. It was testified by most of the witnesses that "S/87 wheat" meant that the seller was to have the season of 1887 in which to complete his contract, and that it meant also that the wheat should be "number one white wheat." There was also testimony to the point that the said phrase "S/87 wheat" does not mean that the one party is to actually deliver the amount of wheat stated in the contract, or that the other party is bound to receive it all and pay the whole amount of the stated price; but that the seller is simply to produce what are denominated "call-board contracts" for the wheat, instead of the wheat itself. And owing to the peculiar character of the contract here sued on, and the testimony as to the technical meaning of some of its terms, we think that the court could not arrive at a just decision of the case without knowing whether the printed matter was a part of the contract, whether it should be considered as a "board contract," and whether the phrase "S/87 wheat" has any meaning other than that given to it by said board, and what that meaning is. The solution of these questions involves matters of fact to be determined upon evidence. We think, therefore, that the testimony of plaintiff Berry when testifying for plaintiffs was properly admitted over the objections of defendant and that the court erred in sustaining objections to the questions asked by defendant of the witness Bonney, as above stated, and also in sustaining the objections to the introduction of the rules and regulations of the stock exchange and call board. The contract may turn out to be a pure gambling contract, and therefore void; but from any point of view, the said evidence offered by defendant should have been admitted.

Judgment and order reversed, and a new trial ordered.

[No. 18741. In Bank.—June 18, 1892.]

HOME FOR THE CARE OF THE INEBRIATES,
APPELLANT, v. CHRISTIAN REIS, TREASURER, ETC.,
RESPONDENT.

HOME FOR THE CARE OF INEBRIATES—RECOVERY OF FINES PAID TO COUNTY TREASURER—MANDAMUS. — There is no law which specially enjoins it as a duty of the treasurer of the city and county of San Francisco, resulting from an office, trust, or station, to pay to the Home for the Care of the Inebriates of San Francisco the amount of any fines collected by the police courts and turned over to him, and *mandamus* will not lie to compel him to pay over to the Home the amount of any fines so collected, although the clerk of the police judge's court may have turned over to the treasurer the moneys which he is enjoined by the act of March 17, 1876, to pay directly to the officers of the Home.

1D.—PAYMENT OF FINES FOR DRUNKENNESS—REPEAL OF STATUTE.—The act of March 17, 1876 (Stats. 1875-76, p. 325), providing that the fines and forfeitures, not exceeding eight hundred dollars in the aggregate in any one month, imposed and collected by the police judge's court in San Francisco for drunkenness, shall be paid by the clerk of such court to the Home for the Care of Inebriates, was not repealed by the act of March 5, 1889 (Stats. 1889, p. 62), reorganising the police court, and providing that all fines and forfeitures imposed by such court should be paid into the treasury of the city by the clerk of each department once a week, and repealing all inconsistent acts and parts of acts, but containing no special reference to the act of March 17, 1876.

1D.—REPEALS BY IMPLICATION—SPECIAL STATUTE WHEN NOT REPEALED BY GENERAL LAW—REPEAL OF INCONSISTENT ACTS.—Repeals by implication are not favored, and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when it does not, in terms, purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect, by language showing that the attention of the legislature was called to the special act, and that the general act was intended to embrace the special cases; and the mere fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of the rule.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Tilden & Tilden, for Appellant.

John H. Durst, and *George Flournoy, Jr.*, for Respondent.

SHARPSTEIN, J.—Appellant applied to the superior court of the city and county of San Francisco for a writ of mandate to compel respondent, as treasurer of said city and county, to pay to the petitioner certain moneys received by him in his official capacity. A general demurrer to the petition was interposed and sustained, and this appeal is from the judgment thereupon entered, denying the relief sought.

A writ of mandate may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. (Code Civ. Proc., sec. 1035.)

The contention of appellant is, that the law specially enjoins upon respondent, as a duty resulting from his office as treasurer, the payment to appellant the moneys demanded of him by it, by reason of certain acts of the legislature, the first of which was approved April 1, 1870, and provides, among other things, that "the Home for the Care of the Inebriates of San Francisco shall always be kept open for the reception and care of inebriates, both male and female, of every nationality and sect, free of charge for their support, care, or medical attendance, while they necessarily remain therein"; and that "any police judge or magistrate of the city and county of San Francisco is hereby empowered to commit any person whom he shall convict of habitual intemperance to said Home."

But the act mainly relied on in support of appellant's contention is an act entitled "An act to provide for the care and maintenance of inebriates and certain insane persons in the city and county of San Francisco," approved March 17, 1876, which provides that "the fines and forfeitures, not exceeding eight hundred dollars in the aggregate in any one month, imposed and collected by the police judge's court in and for the city and county of San Francisco, from persons arrested for being drunk, or under the influence of liquor, shall be, by

the clerk of said police judge's court, immediately paid to the president, secretary, and treasurer, or a majority of them, at the Home for the Care of Inebriates of said city and county for the support and maintenance of said Home for the Care of Inebriates, and the construction and improvements of a building for said Home for the Care of Inebriates"; and that "all persons in said city and county charged with being insane, and pending their examination, or found to be insane and *en route* for a state insane asylum, shall be placed in the said Home, . . . without charge to said city and county."

The treasurer of the city and county of San Francisco is not by this act enjoined, nor even authorized, to receive or disburse any of said moneys, but the duty of paying said moneys to the officers of the Home is expressly imposed upon the clerk of the police judge's court, and he is required to pay it to them *immediately*.

Section 75 of article VI. of the Consolidation Act requires that "all fines, penalties, and forfeitures imposed for offenses committed within the said city and county shall be received by the Clerk or magistrate of the respective court, and paid into the treasury thereof as a part of the police fund." And since the passage of the act of March 17, 1876, it has been the duty of said clerk or magistrate to pay into said treasury any excess over eight hundred dollars received in any one month by them for fines, etc.

Whatever sum or sums the treasurer received from that source became at once a part of the police fund, out of which the fixed salaries of police captains and officers, chief of police, police judge, and clerk of the police court could alone be paid.

It is the duty of the treasurer to safely keep all moneys belonging to or paid into the treasury, and not to pay out any part of said moneys except upon demands authorized by the Consolidation Act. By an act approved March 5, 1889, the clerk of each department of the police court is required to pay into the treasury of

said city and county, once a week, all fines and forfeitures imposed by said court. This act is clearly repugnant to that which required the clerk of said court to pay an amount, not exceeding eight hundred dollars in any one month, of the fines and forfeitures imposed and collected by the police court from persons arrested for being drunk or under the influence of liquor, immediately to certain officers of appellant. Besides, the act of 1889 contains a clause repealing all acts and parts of acts in conflict with any of its provisions. But whatever effect may be given to this latter act, there is not, nor ever has been, any law which specially enjoins it as a duty of the respondent, resulting from an office, trust, or station, to pay to appellant any money from the treasury, no matter from what source received.

Judgment affirmed.

PATERSON, J., concurred.

DE HAVEN, J., concurring. — I concur in the judgment of the affirmance, upon the ground that *mandamus* is not the proper remedy, but I dissent from so much of the opinion of Mr. Justice Sharpstein as holds that the act of March 17, 1876 (Stats. 1875-76, p. 325), is repealed by the later act of March 5, 1889 (Stats. 1889, p. 62); and upon this latter point I adopt as a correct statement of the law the opinion of Mr. Commissioner Belcher, prepared for the court upon the former submission of this case. In that opinion it is said:—

“By an act of the legislature, approved April 1, 1870 (Stats. 1869-70, p. 585), it was provided that ‘the Home for the Care of the Inebriates of San Francisco shall always be kept open for the reception and care of inebriates, both male and female, of every nationality and sect, free of charge for their support, care, or medical attendance, while they necessarily remain therein’; and that ‘any police judge or magistrate of the city and county of San Francisco is hereby empowered to commit any person whom he shall convict of habitual intemperance to said Home.’

"By another act, entitled 'An act to provide for the care and maintenance of inebriates and certain insane persons in the city and county of San Francisco,' approved March 17, 1876 (Stats. 1875-76, p. 325,) it was provided that 'the fines and forfeitures, not exceeding eight hundred dollars in the aggregate in any one month, imposed and collected by the police judge's court in and for the city and county of San Francisco, from persons arrested for being drunk or under the influence of liquor, shall be by the clerk of said police judge's court immediately paid to the president, secretary, and treasurer, or a majority of them, of the Home for the Care of Inebriates of said city and county, for the support and maintenance of said Home for the Care of Inebriates, and the construction and improvements of a building for said Home for the Care of Inebriates'; and that 'all persons in said city and county charged with being insane, and pending their examination, or found to be insane and *en route* for a state insane asylum, shall be placed in said Home, and shall be cared for by the officers thereof while in said Home, without charge to said city and county.'

"The petitioner is now, and has been for more than twenty-five years, an eleemosynary corporation, duly incorporated and existing under the laws of this state, and situated in the city and county of San Francisco. It has a duly elected, qualified, and acting president, secretary, and treasurer, and is the owner of a lot and building thereon, in the said city and county, which is now, and has been for several years, used as a home for inebriates and insane persons committed to its care. It has always, since the passage of the aforesaid acts, fully complied with their provisions, and has at all times kept its Home open for the reception and care of inebriates, both male and female, of every nationality and sect, free of charge for their support, care, and medical attendance, and has received therein all persons in said city and county charged with being insane, and pending their examination, and all persons found to be insane

and *en route* to an insane asylum, and has cared for, supported, and furnished medical attendance to them, without charge. It now has under its care a large number of persons who are habitually intemperate, and others who are insane, and the money appropriated by the act of March 17, 1876, is necessary to pay for the maintenance of the said Home.

"Between the fifth day of March and the first day of November, 1889, certain fines and forfeitures, the amount for each month being specifically named, were by the police court of the city and county of San Francisco imposed upon and collected from persons arrested for being drunk or under the influence of liquor; and all of the moneys so collected were paid into the hands of the respondent, as treasurer of the said city and county, and are now in his possession. Prior to the commencement of this proceeding, petitioner duly demanded of respondent payment of all the said several sums of money, except the amounts in excess of eight hundred dollars, but respondent refused, and has ever since refused, to pay the same, or any part thereof, to it, or to any of its officers, or to any one in its behalf. Wherefore judgment is asked, commanding such payment to be made.

"The respondent contends that the act of March 17, 1876, was repealed by an act approved March 5, 1889. (Stats. 1889, p. 62.)

"The last-named act is entitled 'An act to create a police court in and for the city and county of San Francisco, state of California,' and the provisions relied upon as effecting the repeal are sections 10 and 13, which read as follows:—

"'Sec. 10. All fines and forfeitures imposed by said court shall be paid into the treasury of said city and county, by the clerk of each department, once a week.'

"'Sec. 13. All acts and parts of acts that are in conflict with the provisions of this act are hereby repealed.'

"It will be observed that no special reference is made to the act of March 17, 1876, and the repeal, if any was

effected, was therefore by implication. But the general and well-settled rule is that repeals by implication are not favored.

"Judge Cooley, in his work on Constitutional Limitations, 6th ed., 182, states the law as follows: 'Repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court holding that the later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect.'

"In Endlich on the Interpretation of Statutes, sec. 223, this language is used: 'A general act is to be construed as not repealing a particular one, that is, one directed towards a *special object* or a *special class* of objects. . . . Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature has been turned to the special act, and that the general one was intended to embrace the special cases within the previous one. . . . The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. . . . The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction.' (And see *People v. Quigg*, 59 N. Y. 83; *Merrill v. Gorham*, 6 Cal. 42; *Crosby v. Patch*, 18 Cal. 439.)

"Under the law as thus declared, can the respondent's contention be sustained? We do not think it can. The police judge's court was created by the Consolidation Act of the city and county of San Francisco, passed in 1856, and it was therein provided that the clerk of the court should 'receive and pay weekly into the treasury

of the city and county all fines imposed by said court.' The act of March 5, 1889, was in effect an amendment of the Consolidation Act, and though it slightly changed the name of the old police court, it was not intended, and did not have the effect, to abolish that court, but only to add another judge thereto, and to reorganize the court thus increased in numbers, by dividing the same into departments, with a presiding judge. (*Ex parte Lloyd*, 78 Cal. 421.)

"The legislature had no power, by a local or special law, to create new offices, or to prescribe the powers and duties of officers (Const., art. IV., sec. 25, subd. 28); nor did it attempt to do so. It simply, so far as the duties of the clerk as to paying over fines were prescribed, repeated, in substance, the language of the old act.

"In this we see nothing to indicate that the attention of the legislature was turned to the special act of March 17, 1876, or that there was any intention or purpose to repeal it.

"It results, that when the respondent received the money in controversy, he received and held it for the use of petitioner."

But conceding this to be so, *mandamus* is not the proper remedy, and if defendant, or the city and county of San Francisco, wrongfully withholds money which belongs to the petitioner, his remedy is by action in the ordinary course of law.

GAROUTTE, J., and BEATTY, C. J., concurred.

McFARLAND, J., dissenting. — I dissent. I concur in the opinion of Mr. Justice De Haven, except as to the remedy.

HARRISON, J., concurring. — The appellant is a private corporation in the city and county of San Francisco, under the management of officers entirely disconnected with the municipal government, and asks for a mandate against the treasurer of said city and county, directing to pay to it a sum of money to which it claims a right

under the provisions of the act of March 17, 1876. (Stats. 1876, p. 325.) It may be very seriously questioned, whether, under the former constitution, the legislature had the power to compel a donation of the city's money to a private corporation, or to direct the payment in each month to such corporation of a specific sum of money, irrespective of any benefit or service rendered by it to the city. Without passing upon this question, the act above referred to is, however, obnoxious to the charge of violating section 31 of article IV. of that constitution, within the principles declared in the cases of *San Francisco v. Spring Valley W. W.*, 48 Cal. 493; *Waterloo Turnpike Road Co. v. Cole*, 51 Cal. 381; *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160. The acts of April 7, 1870 (Stats. 1869-70, p. 585), prescribing the powers and duties of the officers of the appellant, which it claims affords the consideration for which it was authorized to receive the money directed to be paid under the act of 1876, was clearly without the power of the legislature to enact. The legislature had no power to confer such special privileges upon any corporation, or to pass any special act conferring authority upon it, or prescribing the powers and duties of its officers. The attempt by these acts to impose any duty or obligation upon the plaintiff was without the constitutional authority of the legislature, and the plaintiff, by virtue of said acts, neither acquired any right nor became subject to any duty.

The provisions of section 10 of the act of March 5, 1889 (Stats. 1889, p. 62), that all fines and forfeitures imposed by the police court shall be paid into the treasury of the city and county of San Francisco, by the clerk thereof, is in direct harmony with section 16 of article XI. of the present constitution, which directs all municipal moneys to be paid to the treasurer, and operates as a direct repeal of that portion of the act of 1876, which authorized the clerk of the police court to pay certain moneys to the appellant.

By bringing this action against the treasurer, the appellant impliedly admits that the act of 1876 is repealed so

far as it directs the payment to it by the clerk of the fines collected by him, but it contends that the other portion of the act is left in force. Inasmuch, however, as under the provision of the constitution above referred to the legislature could not have authorized the payment of those fines to any other officer than the treasurer of the city and county, it must be held that the entire act is repealed, even if it had any validity when originally enacted. After the money has once been received into the treasury, the treasurer is not authorized to pay out any portion thereof, except as authorized by law, and after the demand therefor shall have been duly audited. Section 82 of the Consolidation Act provides that "no payment can be made from the treasury or out of the public funds of said city and county, unless the same be specifically authorized by this act, nor unless the demand which is paid be duly audited, as in this act provided, and that must appear upon the face of it." Section 84 of the same act declares that "every demand upon the treasury . . . must, before it can be paid, be presented to the auditor of the city and county, to be allowed, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city and county is authorized by law, and out of what fund. . . . No demand can be approved, allowed, audited, or paid, unless it specify each several item, date, and value composing it, and refer to the law by title, date, and section authorizing the same." It is not alleged by the appellant that the claim which it asks that the treasurer be directed to pay was in any respect audited, as above provided.

The provision in section 10 of the act of 1889, directing the clerk of the police court to pay these moneys into the treasury, is not the creation of any new office, or the conferring of any additional powers upon an existing officer, but a mere direction to him for the disposition of the moneys which he may receive. Nor did the provisions of the act of 1876, even if that act was constitutional, create a contract between the appellant and

the city, or give to the appellant any rights or privileges which could not at any time thereafter be revoked by the legislature. It was but an act of legislation, subject to repeal at the will of the body which enacted it.

For these reasons, as well as for those contained in the opinion of Mr. Justice Sharpstein, the judgment should be affirmed.

[No. 14969. In Bank.—June 18, 1892.]

**E. F. SPENCE, TRUSTEE, RESPONDENT, v. JESSUP
W. SCOTT ET AL., DEFENDENTS, AND HENRY I.
KOWALSKY, APPELLANT.**

FORECLOSURE OF MORTGAGE — APPEAL — BOND FOR DEFICIENCY.—Where a decree foreclosing a mortgage includes a deficiency judgment, its execution cannot be stayed, in favor of any appellant, unless he gives an undertaking on appeal to provide for the payment of such deficiency, although he may not be the mortgagor, and there is no deficiency judgment against him, and regardless of whether he is in possession or not.

APPLICATION to stay execution upon appeal from a judgment of the Superior Court of the county of Los Angeles foreclosing a mortgage. The facts are stated in the opinion of the court.

David Friedenrich, for Appellant.

A. B. Hotchkiss, for Respondent.

Houghton, Silent & Campbell, for Defendant Scott.

The COURT.—This cause is now before us upon the application of appellant Kowalsky for an order restraining the sheriff of Los Angeles County from executing a deed to respondent, pursuant to a foreclosure sale, upon the ground that said Kowalsky has appealed to this court from the judgment of foreclosure, and has executed an undertaking on appeal which stays all proceedings. A temporary order was made, so restraining the sheriff

pending the hearing and determination of the application.

It appears now that the decree of foreclosure included a deficiency judgment, and that the undertaking on appeal in this case does not provide for the payment of such deficiency. It was substantially decided in the case of *Johnson v. King*, 91 Cal. 307, that in such a case the appellant, whosoever he may be, if he desires a stay of proceedings, must give an undertaking for the deficiency. And that case is not in conflict with either *Home Loan Ass'n v. Wilkins*, 64 Cal. 379, or *Englund v. Lewis*, 25 Cal. 327, cited by appellant. In the former case an opinion seems to have been first rendered in Department, but a hearing in Bank was ordered, and in the opinion of the court in Bank the point involved here was not determined; while *Englund v. Lewis*, 25 Cal. 327, is strictly in accord with *Johnson v. King*, 91 Cal. 307.

It is true that in *Johnson v. King*, 91 Cal. 307, the appellant was in possession, although he was not the mortgagor, and there was no deficiency judgment against him; but it was held that the provision applies to all appellants. Section 945 of the Code of Civil Procedure is entirely clear upon the subject. It provides that a judgment of foreclosure shall not be stayed unless there be an undertaking "on the part of the appellant," to the effect, among other things, that "when the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

The temporary restraining order is discharged, and the application is dismissed.

[No. 18829. In Bank.—June 18, 1892.]

JAMES F. JATUNN, APPELLANT, v. J. M. SMITH, ET AL., RESPONDENTS.

PRESCRIPTION—ADVERSE USER OF WATER—PUBLIC LANDS—GRANT FROM GOVERNMENT.—There can be no adverse possession of land, or adverse user of water to the natural flow of which such land is entitled, so long as the title to the land remains in the United States; but a prescriptive right to the use of water may be acquired after the legal title of such land has vested in a grantee of the government.

ID.—GRANT TO CENTRAL PACIFIC RAILROAD COMPANY—VESTING OF TITLE.—The grant of land to the Central Pacific Railroad Company, by the acts of Congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant in *present*, passing the legal title to the lands granted as of the date of the grant, as soon as the sections were identified by a legal survey and the definite location of the road.

ID.—PATENT FOR RAILROAD LAND—DIVERSION OF WATER—STATUTE OF LIMITATIONS.—As the legal title to land granted to the Central Pacific Railroad Company vested in the company upon identification of the land, and not at the date of the patent issued by the United States, the statute of limitations commenced to run in favor of one who diverted the waters of a stream upon the land after such identification and prior to the date of the patent, from the date of the diversion, as against the railroad company and its grantees.

ID.—EFFECT OF GRANT—ADVERSE POSSESSION—SUBSEQUENT PATENT.—When the legal title to land is granted by act of Congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department under authority of law, and such land then becomes subject to the limitation laws of the state in which it is situated, and an adverse possession thereof, after the date of such grant for the requisite period fixed by such laws, will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor in pursuance of such act of Congress.

ID.—RECITALS IN PATENT—SURVEY AND IDENTIFICATION OF LAND GRANTED—PAYMENT OF COSTS AND FEES.—The recitals in the patent from the United States to the Central Pacific Railroad Company, showing that the line of the railroad was definitely located, and that the company afterward filed with the register and receiver at Sacramento a selection of the land under the acts of Congress, and that such selection was properly certified to or approved by such register and receiver, are sufficient proof of the fact that the land was at the date of its selection surveyed by authority of the United States, and identified as land to which the grant made to the company had then attached, and that the costs of such survey and other fees required by law had been paid by such company.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

C. W. Kitts, for Appellant.

P. F. Simonds, for Respondents.

DE HAVEN, J. — The plaintiff is the owner of a tract of land through which flows a stream of water known as Wolf Creek, and the defendants, more than five years prior to the commencement of this action, diverted the waters of said stream at a point above where it enters upon the land of plaintiff. This action is brought for the purpose of enjoining the defendants from hereafter taking or diverting any of the waters of said stream, and for a judgment that plaintiff is entitled to have the stream flow down its natural bed and across the land of plaintiff.

In their answer, the defendants allege that plaintiff's cause of action is barred by the statute of limitations. The plaintiff was nonsuited, and from this judgment he appeals.

The land owned by plaintiff is an odd numbered section, which was granted to the Central Pacific Railroad Company to aid in the construction of its road by the acts of Congress of July 1, 1862 (12 U. S. Stats. at Large, 489), and July 2, 1864 (13 Stats. at Large, 356), and the patent therefor did not issue to the railroad company until April, 1884, which was less than five years before this action was brought. The railroad, however, was constructed from Sacramento to the Nevada state line, and fully completed and equipped in the manner prescribed by said acts of Congress, as early as November 3, 1869, and this fact was on that day properly certified to by the commissioners appointed by the President for the purpose of examining and reporting in relation to the construction of said road, as is shown by the recitals contained in the patent.

The title of plaintiff to the land owned by him is found upon a deed executed to him by the Central

Pacific Railroad Company, in December, 1884, after it obtained its patent from the United States. The defendants diverted the waters of Wolf Creek in 1874, and it is not claimed by the appellant that the evidence given upon the trial in the superior court was insufficient to show that such diversion was thereafter continued under claim of right, and under such circumstances as to ripen into a prescriptive right in defendants, if the statute of limitations commenced to run in their favor prior to the date of the patent issued by the United States to his grantor, the railroad company.

The contention of appellant is, that the United States, *by its patent*, conveyed to the railroad company the legal title to the land now owned by him, with all its natural riparian rights as they existed at the date of the definite location of the railroad, and that as defendants could not hold adversely to the United States, they can derive no advantage from their acts of diversion and user prior to the date of the United States patent.

It was held by this court in the case of *Mathews v. Ferrea*, 45 Cal. 51, that there could be no successful assertion of a claim to a prescriptive right to divert waters from a stream, to the injury of a riparian proprietor below who had acquired his title from the United States within five years, the court in its opinion saying that "prescription or adverse user will not mature into a title as against the United States, and that it will not avail as a defense unless the user has been adverse for the requisite period after the title passed from the United States."

There can be no doubt of the correctness of the rule as thus declared. The general government is not subject to the jurisdiction of the state, and the latter is without power to prescribe the time within which the United States shall assert its rights in order to preserve them, and it must be regarded as settled that the statute of limitations of a state does not apply to the government of the United States, and, as a consequence, that there can be no adverse possession of land under such a law,

or adverse user of water, to the natural flow of which such land is entitled, while the title remains in the United States. (*Freemont v. Seals*, 18 Cal. 434; *Nessler v. Bigelow*, 60 Cal. 98; *Gardiner v. Miller*, 47 Cal. 470; *Treadway v. Wilder*, 12 Nev. 108; *Gibson v. Choteau*, 13 Wall. 98.)

But we are unable to agree to the proposition contended for by appellant, that the legal title to the land owned by him remained in the United States until the issuance of the patent therefor to the Central Pacific Railroad Company, in 1884, and that the effect of such patent was to then convey to the railroad company the legal title to such land, with all the riparian rights which belonged to it at the time of the definite location of the line of such railroad. On the contrary, the grant of land to that company by the acts of Congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant *in præsenti* of every alternate section of land not reserved by such granting acts, passing the legal title thereto as of the date of the grant, as soon as those sections were identified by a legal survey, and the definite location of the road for which the grant was made.

In defining the nature of the grant made by the acts of Congress just mentioned, the supreme court of the United States, in the case of *Desert Salt Co. v. Tarpey*, 142 U. S. 241, say: "As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a 'float'; but when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in the mean time under its provisions appropriated to other purposes. . . . The terms used in the granting clause of the act of Congress, and the interpretations thus given to them, exclude the idea that they are to be treated as words of contract or promise, rather than, as

they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest." See also *Denny v. Dodson*, 32 Fed. Rep. 899; *Forrester v. Scott*, 92 Cal. 398, in which similar grants are construed in the same manner. And it was further held, in the case from which we have just quoted, that although the acts of Congress above referred to provide for the issuance of patents to the railroad company for the lands granted, upon the conditions therein named, that such patents are not needed to convey the legal title to such lands, and it was not contemplated by those acts that they should be issued for any such purpose. Upon this point the court said: "While not essential to transfer the legal right, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would be thus, in the grantee's hands, deeds of further assurance of his title and therefore a source of peace and quiet to him in his possession."

It necessarily follows from this view of the nature of the grant made to the Central Pacific Railroad Company by the acts of Congress, before mentioned, the position of appellant, that upon the completion of its railroad such company became only the equitable owner of the lands granted to it, and that the United States thereafter held the legal title to such lands in trust for it until the issuance of the patents provided for by said acts of Congress, cannot be sustained. The land owned by plaintiff is an odd-numbered section, and the legal title to it passed from the United States to the Central Pacific Railroad

Company when identified by a survey and the definite location of the line of its road. The title passed by the words of grant contained in the acts of Congress, and not by the patent subsequently issued to it.

When the legal title to land is granted by act of Congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law, and such land then becomes subject to the limitation laws of the state in which it is situated; and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor, in pursuance of such act of Congress. (*Langdeau v. Hanes*, 21 Wall. 521; *Langlois v. Crawford*, 59 Mo. 456; *Peting v. De Lore*, 71 Mo. 13; *Ryan v. Carter*, 93 U. S. 78.)

The recitals contained in the patent under which plaintiff claims show that the line of the Central Pacific Railroad Company was definitely located prior to November 3, 1869, and that the company, on July 26, 1882, filed with the register and receiver at Sacramento a selection of plaintiff's land, under the acts of Congress before referred to, and that such selection was on that day properly certified to or approved by such register and receiver. These recitals are sufficient proof of the fact that the land was at the date of such selection surveyed by authority of the United States, and identified as land to which the grant made to that company had then attached, and that the costs of such survey, and other fees required by law, had been paid by such company. This being the case, it must be held, in accordance with the views contained in this opinion, that the legal title to such land was at that time vested in the Central Pacific Railroad Company, and the defendants, by their continued diversion of the waters of Wolf Creek thereafter, under claim of right, until the commencement of this action in 1889,

a period of more than five years, have acquired a prescriptive right to do so.

Judgment and order affirmed.

HARRISON, J., SHARPSTEIN, J., PATERSON, J., and GAROUTTE, J., concurred.

[No. 18043. In Bank.—June 18, 1892.]

GEORGE W. TYLER, APPELLANT, v. GEORGE T. MAYRE, ADMINISTRATOR, ETC., ET AL., RESPONDENTS.

- ASSIGNMENT IN TRUST—TRUSTEE AS BENEFICIARY—ASSIGNOR'S ATTORNEY — TRUST FOR FEES AND DISBURSEMENTS.**—Where the owner of a note, upon which a suit is brought against the makers, assigns it in trust, together with all the avails of the action, and certain other claims to secure certain specified obligations, "first deducting and paying out of any money that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment is also made," the fact that the assignee is one of the beneficiaries named does not prevent the assignment from creating a trust, which may be enforced in favor of the attorney of the assignor, or his fees and disbursements for costs in the suit on which the note was made.
- ID.—ENFORCEMENT OF TRUST AGAINST ADMINISTRATOR OF TRUSTEE.**—Such trust devolves upon the administrator of the trustee, and may be enforced directly against him by the assignor's attorney, as an equitable cause of action.
- ID.—PROMISE FOR BENEFIT OF ANOTHER—EXECUTED CONSIDERATION—AGREEMENT BY ASSIGNEE TO PAY ATTORNEY'S FEES OF ASSIGNOR.**—The agreement by the assignee to pay the fees of the assignor's attorney, being based upon an executed consideration, may be enforced by the attorney, as a promise made for his benefit, by an action at law against the assignee.
- ID.—ESTATES OF DECEDENTS—PRESENTATION OF CLAIMS—PLEADING.**—The cause of action in favor of the attorney of the assignor, against the administrator of the assignee, is not governed by section 1493 of the Code of Civil Procedure; and if the administrator pleads the statute of limitation, the cause of action against him is not affected by a finding that the cause of action against the deceased assignor was barred by that section, however it might affect the estate of the assignor.
- ID.—SEPARATE RELIEF AGAINST ONE OF SEVERAL DEFENDANTS—PRAYER OF COMPLAINT.**—The relief to which the plaintiff is entitled against any one of the defendants is not limited by his prayer for relief against other defendants; but he is entitled to any relief justified by the facts alleged in the complaint if proved, or admitted.
- ID.—DISQUALIFICATION OF PLAINTIFF AS WITNESS—CLAIM AGAINST ESTATE.**—The plaintiff in such action cannot testify against the adminis-

atrix of the deceased assignor to an agreement made between the assignor, the assignee, and the plaintiff, to the effect that the plaintiff should continue to prosecute the suit upon the assigned note as attorney for the assignor, and be paid a reasonable fee out of the proceeds of the judgment, if collected, nor can he testify to any matters of fact occurring before the death of the assignor.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial.

The facts are stated in the opinion of Mr. Commissioner Vancleaf.

D. H. Whittemore, and Whittemore & Sears, for Appellant.

Aylett R. Cotton, W. H. H. Hart, J. B. Reinstein, and A. J. Le Breton, for Respondents.

THE COURT. — After hearing in Bank, we are satisfied with the conclusion reached in Department, and with the opinion therein delivered by Commissioner Vancleaf, and for the reasons stated in such opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

DE HAVEN, J., concurring. — I concur in the judgment of reversal, but dissent from that part of the opinion which holds that the court erred in sustaining the objection made to plaintiff's offer to show by his own testimony that it was "agreed between plaintiff, Jane E. Chase, and William Irvine, that plaintiff should continue to prosecute the case as attorney for plaintiff, and if he finally succeeded in getting a judgment, he should be paid out of the proceeds of said judgment, when collected, a reasonable fee"; and the further offer to show by the same testimony what was agreed at the same time in reference to the written agreement referred to in the testimony of witness Reinstein.

HARRISON, J., and GAROUTTE, J., concurred.

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SHARPSTEIN, J., dissenting. — There are four assignments of error herein, two of which are based upon the refusal of the court to permit plaintiff to testify to matters of facts, occurring before the death of Jane E. Chase, deceased, whose administratrix, Clara J. Slater, was a defendant in the action. The only question which arises upon the exceptions to the rulings of the court upon the objections to the competency of the plaintiff to testify as to the matters of fact occurring before the death of Jane E. Chase is, whether the action is prosecuted against the administratrix of her estate, *upon claim or demand against said estate*.

The complaint states facts sufficient to constitute a cause of action against said administratrix, and the plaintiff prays for judgment; that there is due him from defendant Clara J. Slater, as administratrix of Jane E. Chase, deceased, the sum of \$1,570, payable out of the amount due on a judgment recovered in the action of said Jane E. Chase against one Evoy, in the prosecution of which plaintiff alleges that he rendered the services as the attorney of said Jane E. Chase, for which he claims there is due him from the administratrix of said estate said sum of \$1,570. The circumstance of his asking to have it adjudged that said amount is payable out of the amount due on said judgment does not change the character of the claim. If it is not a claim against the estate, it cannot be adjudged payable out of a judgment belonging to the estate. The plaintiff was not a competent witness to prove the facts which he offered to prove by his own evidence, and the court properly sustained the objections to his testifying to said facts. (Code Civ. Proc., sec. 1880.) The court did not err in permitting the defendants to prove by the witness Reinstein that he had seen a written agreement between plaintiff and Jane E. Chase, in which it was stipulated that plaintiff should receive two hundred and fifty or three hundred dollars for his services in the action of *Chase v. Evoy*.

The finding of the court, that Jane E. Chase did not assign anything to William Irvine in trust, for the pur-

pose of paying to plaintiff for his services as her attorney, or for the purpose of paying him any charge or claim whatsoever, is, in my opinion, justified by the evidence. In the assignment of Jane E. Chase to Irvine, the plaintiff is once, and only once, mentioned. After declaring that the assignment is made in trust for the following uses, intents, and purposes, to wit, there follows this clause: "To secure to George W. Tyler and H. K. W. Clark, their and each of their heirs, executors, and administrators, for their respective obligations and liabilities incurred by them, and either of them, as the bondsmen of the party of the first part, as administratrix of the estate of M. S. Chase, deceased, made and delivered on her appointment as such administratrix, and also to secure any other substitutes of said bondsmen, or either of them, to be hereafter substituted as her bondsmen in the matter of her administration of said estate, first deducting and paying out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made." I fail to discover any intention to assign the claim against Evoy in trust, for the payment of plaintiff's fees and charges for prosecuting an action to recover the same. Therefore, in my judgment, the finding that no such assignment was made, or trust created, should not be disturbed.

I think the judgment and order should be affirmed.

The following is the opinion of Commissioner Vanclief, rendered in Department One on the 30th of June, 1891:—

VANCLIEF, C. — On November 24, 1873, one Jane E. Chase, being the owner and holder of a promissory note made by Briggs, Evoy, and Cobb, employed plaintiff, as her attorney at law, to bring suit on said note, which he did, and on the 3d of December, 1873, recovered final judgment thereon against the estate of Evoy (then deceased) for \$6,175. On May 21, 1878, Jane E. Chase

executed to the defendant William Irvine, the following instrument: "Know all men by these presents, that Jane E. Chase, of Martinez, Contra Costa County, California, party of the first part, for the consideration and purpose hereinafter set forth, hath sold, assigned, transferred, and set over, and doth hereby sell, assign, transfer, and set over, unto William Irvine, of the city and county of San Francisco and state aforesaid, party of the second part, all and singular the following claims, indebtedness, and obligations, to wit: The certain promissory note, in writing, made and executed to me by M. G. Cobbs, G. G. Briggs, and John Evoy, for the principal sum of twenty-five hundred dollars, gold coin, with interest at the rate of one and one half per cent per month, payable in thirty days from the date thereof, and dated August 21, 1871, now in suit in the third district court in and for the county of Alameda, wherein the said party of the first part is plaintiff, and Mary J. Evoy, administratrix of the estate of John Evoy, deceased, and others are defendants, together with all the avails of said action that may be paid, collected, or realized on or on account of the said note, and in the said action; and also the following insurance claim of the party of the first part, viz.: Claim against the Hartford Fire Insurance Company for \$2,500; claim against the Lamar Insurance Company for \$1,950; and claim against the Rhode Island Association for \$1,950; all which insurance claims are now in suit in the district court of the tenth judicial district in and for the city and county of San Francisco; together with all and singular the avails and moneys that may be paid, collected, recovered, or received for or on account of said several claims; provided always, that this assignment, sale, and transfer of said several claims and demands is made by said party of the first part to said party of the second part in trust, and to and for the following uses, intents, and purposes, to wit: To secure George W. Tyler and H. K. W. Clark, their and each of their heirs, executors, and administrators, for their respective obligations and liabilities incurred by

them, and either of them, as the bondsmen of the party of the first part, as administratrix of the estate of M. S. Chase, deceased, made and delivered on her appointment as such administratrix, and also to secure any other substitutes of said bondsmen, or either of them, to be hereinafter substituted as her bondsmen in the matter of her administration of said estate, first deducting and paying out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made; hereby constituting and appointing the said party of the second part my true and lawful attorney, in my place and stead, to demand, collect, receive, and recover the said several demands, indebtedness, and claims, with full power and authority to compound for and settle and give acquittances for the same, as fully, in all respects, as I could do in my own proper person, but for this assignment and power." On August 28, 1881, Jane E. Chase died, and in July, 1882, defendant Clara J. Slater was appointed administratrix of her estate; the said Clara and the defendant Rhodes being her only heirs at law. On November 12, 1882, William Irvine died, and on December 4, 1882, the defendant Mayre was appointed administrator of his estate.

The purpose of this action is to recover from the estate of Irvine, through the administrator thereof, a portion of the money realized, or to be realized, from the judgment against Evoy, sufficient to pay plaintiff's fee (alleged to be fifteen hundred dollars) as attorney for Chase in the action in which that judgment was recovered; and also seventy dollars, alleged to have been expended by plaintiff as costs in the prosecution of that action; the plaintiff contending that the assignment of the note by Chase to Irvine was in trust to pay from the money realized from the note, among other things, first, the attorney's fees and charges due plaintiff for his services in said action on the note, which action was still pending (on appeal) at the time of the assignment of the note.

Before the commencement of this action, by agreement of the parties interested, one thousand dollars of the money realized from the judgment on the note were deposited in the Bank of Martinez (the corporation defendant) to abide the judgment in this action. The prayer of the complaint is, — 1. That the court appoint some competent person to carry out said trust; 2. That it be adjudged "that there is due plaintiff from . . . the estate of Jane E. Chase, deceased, the sum of \$1,570, payable out of the amount due on said judgment; 3. That the Bank of Martinez pay to said trustee the said sum of \$1,000; and 4. That said trustee proceed to collect from the administratrix of John Evoy the amount due on said judgment, and pay the plaintiff out of the money so collected the sum of \$1,570"; and for such other relief, etc. The separate answer of Mayre, administrator of Irvine, admits all the allegations of the complaint, and alleges that he has no interest in the subject-matter of this suit, because, he says, the estate of Evoy, with the consent of the administratrix of the estate of Chase, has paid to the estate of Irvine "all the money due to said Irvine's estate," and therefore he "consents to any judgment herein that to the court may seem meet. The same is not to be taken against the said Mayre for any relief of costs." The separate answer of Shaw, administrator of the estate of Evoy, denies all the allegations of the complaint, and avers that, in obedience to an order of court made in the matter of the estate of Evoy, he paid upon the claim of the estate of Jane E. Chase the sum of \$6,765. The joint answer of Slater, administratrix of Chase, and the Bank of Martinez denies that the assignment of Chase to Irvine was made in trust to secure payment of plaintiff's fees as attorney for Chase or for plaintiff's benefit, except as indemnity to him for having become a surety on the bond of Chase as administratrix of the estate of M. S. Chase, deceased; denies that the services of plaintiff were reasonably worth fifteen hundred dollars, or any sum whatever; denies the necessity for the appointment of any trustee to succeed Irvine;

avers, in proper form, that the claim of plaintiff set up in his complaint, and upon which the action is based, is barred by section 1493 of the Code of Civil Procedure, and also by section 1500 of the same code. The court found that the plaintiff performed the services charged for in his complaint under a special agreement with Jane E. Chase, to the effect that she was to pay him therefor only three hundred dollars, which was to be paid only "out of any moneys that might be collected upon final judgment recovered by plaintiff in that suit," viz., the suit in which the services were rendered; but also found that plaintiff's causes of action against the estate of Jane E. Chase were barred by section 1493 of the Code of Civil Procedure. As matter of law, the court construed the written assignment of the note by Chase to Irvine as not being in trust for plaintiff's benefit, and as not giving him any lien upon or interest in that note, or the money to be collected in the suit thereon, as security for his fees or expenditures in the prosecution of such suit, or otherwise. As a necessary result of these findings, the court gave judgment for the defendants; from which, and an order denying his motion for a new trial, the plaintiff appeals.

1. As contended by appellant, I think the court misconstrued the assignment from Chase to Irvine. That the assignment was in trust for certain purposes, and accepted as such by Irvine, there should be no doubt (Civ. Code, secs. 2221, 2222), though Irvine, the trustee, was also one of the beneficiaries. (Perry on Trusts, secs. 59, 297.) That one of the purposes of the trust was to pay the plaintiff and other attorneys of Chase their proper fees and charges for services and expenditures in the actions in which they were employed is expressed with sufficient certainty in the instrument itself. Before applying the money to be realized from the note and other claims assigned to any other purpose of the trust, the trustee is directed to deduct and pay "out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the

payment of which this assignment and transfer is also made." It appears that suits upon all the demands assigned were pending at the time of the assignment, and that plaintiff was the attorney for the assignor in the suit upon the note of Evoy, and rendered the services alleged by him, and was entitled to proper fees therefor, though it is found that a special agreement between him and Chase limited his fees to three hundred dollars, to be paid only from the money recovered on the note.

2. The trust in this case devolved upon the administrator of Irvine (Perry on Trusts, secs. 143, 144), and the facts stated in the complaint constitute an equitable cause of action directly against Irvine's administrator. The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission. (Civ Code, sec. 2251; *Bettis v. Townsend*, 61 Cal. 333.) And even though the relation between Chase and Irvine should be held not to be that of trustor and trustee, the agreement between Chase and Irvine, upon a sufficient executed consideration, that the latter should pay plaintiff for his services to Chase, may be enforced by plaintiff directly against Irvine in an action at law. (Civ. Code, sec. 1559; *McLaren v. Hutchinson*, 22 Cal. 188; 83 Am. Dec. 59; *Pomeroy on Remedies*, sec. 139; *Wharton on Contracts*, secs. 785 et seq., and notes.) To plaintiff's alleged cause of action against Irvine's administrator, section 1493 of the Code of Civil Procedure has no proper application; nor was it or any other statute of limitation pleaded by the administrator of Irvine, whose answer admits all the allegations of the complaint, and consents to any judgment deemed proper by the court, except a judgment against him for costs; and therefore plaintiff's cause of action against the administrator of Irvine is not affected by the finding that his cause of action against the administratrix of Chase was barred by section 1493 of the Code of Civil Procedure. No question is raised as to the propriety of having joined the administratrix of Chase as a party defendant. Perhaps she was properly joined, for the reason that she may

be entitled to a resulting interest in the trust fund after all the purposes of the trust shall be satisfied; and in view of one branch of the prayer of the complaint, it may have been prudent and proper for her to plead section 1493 of the Code of Civil Procedure as a bar to any relief sought against the estate of Chase. But the relief to which plaintiff is entitled against any one of the defendants is not limited by his prayer for relief against other defendants. He is entitled to any relief justified by the facts alleged in his complaint, if such facts are proved or admitted.

3. J. B. Reinstein was called as a witness by the defendants to prove the contents of a lost paper writing, relating to the compensation plaintiff was to receive for his services in the case of *Chase v. Evoy and others*, and testified as follows: "That paper I saw was an agreement between Jane E. Chase and George W. Tyler, signed by both, in which the sum of \$250 or \$300 was mentioned, to be paid to Tyler out of the proceeds of any judgment he might secure in that case, for his services in that suit, and in connection with the promissory note on which that suit was founded. I cannot remember the whole or exact contents of the paper, but that much I do remember." The plaintiff, in rebuttal, offered to prove, by his own oath, that the paper spoken of by witness Reinstein was an agreement between him and Jane E. Chase, providing for the payment for his services in preparing and presenting the claim against the estate of John Evoy, and in bringing said suit, and in procuring a judgment in the district court; and when the note and suit was assigned by Jane E. Chase to William Irvine in trust, plaintiff went to Jane E. Chase's room, at her request, and there met Mr. William Irvine, and the whole matter was talked over between the three; that plaintiff was told of the assignment to Irvine in trust; and that he was to look to him thereafter for his pay for his services and expenses in said suit, which he agreed to do; that the first contract was talked about, and it was conceded

by J. E. Chase, William Irvine, and himself that the agreement provided only for the preparation and presentation of the claim against the estate of John Evoy, deceased, and the bringing of suit and the trial of the case in the district court; that it was then and there agreed between plaintiff, Jane E. Chase, and William Irvine, that plaintiff should continue to prosecute the case as attorney for plaintiff, and if he finally succeeded in getting a judgment, he should be paid out of the proceeds of said judgment, when collected, a "reasonable fee."

This proffered testimony was objected to, "as incompetent," under section 1880 of the Code of Civil Procedure, because it is not competent for plaintiff to testify, as against the administratrix, to any matters of fact occurring before the death of Jane E. Chase. The court sustained the objection, and excluded the testimony. Conceding that this testimony would have been incompetent to prove a cause of action against the administratrix of Chase, I think it was admissible in this action to establish and enforce a trust against the administrator of Irvine, even though it incidentally involved proof of a contract between plaintiff and Chase, made during the life of the latter. (*Myers v. Reinstein*, 67 Cal. 89; *Knight v. Russ*, 77 Cal. 410; *Perry on Trusts*, sec. 86.)

4. As already remarked, the trust devolved upon the administrator of Irvine; but even if the trusteeship had been vacant, there would have been no necessity for the appointment of a successor to Irvine, as it appears that all parties controlling and interested in the trust fund are before the court. (*Perry on Trusts*, sec. 873.)

I think the judgment and order should be reversed, and the cause remanded for a new trial.

BELCHER, C., and FITZGERALD, C., concurred.

Rehearing denied.

[No. 13968. In Bank. — June 18, 1892.]

WILLIAM S. BARNES, RESPONDENT, v. HATTIE A. SMITH BARNES, APPELLANT.

DISMISSAL ON ACTION—ORDER OF ATTORNEY FOR PLAINTIFF—JUDGMENT—

JURISDICTION — APPEARANCE OF DEFENDENT.—The filing, by a plaintiff in an action, of a paper stating that the action is thereby dismissed, simply amounts to an order for the dismissal of the action upon which the clerk is authorized to enter a judgment of dismissal, and does not of itself operate as a dismissal of the action; and the court retains jurisdiction of the action until the judgment of dismissal is entered by the clerk: and if no judgment is entered, and the defendant appears and answers after the order for dismissal is filed, the court has jurisdiction to render judgment in the cause for the plaintiff.

DIVORCE — EXTREME CRUELTY — MENTAL SUFFERING — CHARGES OF PERSONAL IMPURITY—EFFECT UPON HEALTH.—A finding that the defendant, in an action for divorce upon the ground of extreme cruelty, inflicted grievous mental suffering upon the plaintiff, by imputing to him, in the presence of others, the grossest immorality and personal impurity, is a sufficient finding of extreme cruelty to sustain a judgment for the plaintiff. It is not necessary to allege or find that the charges complained of had an injurious effect upon the health of the plaintiff.

ID. — DEFINITIONS OF EXTREME CRUELTY.—Any unjustifiable conduct upon the part of either of the spouses, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.

ID. — GAUGE OF MENTAL SUFFERING.—It is not necessary that there should be any exact measure or scale by which to gauge purely mental susceptibilities and sufferings.

ID. — QUESTION OF FACT — DELICACY OF FEELING.—Whether in any case there has been inflicted such grievous mental suffering as will warrant the granting of a divorce upon the ground of extreme cruelty, is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given.

CONTINUANCE — DISCRETION — GOOD FAITH OF APPLICATION.—Applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal unless the record affirmatively shows that it abused its discretion. There is no abuse of discretion in refusing to grant a continuance if the circumstances cast suspicion on the good faith of the application, and induce the belief that it was intended only for delay.

ID. — LIABILITY OF DISCRETION IN DIVORCE CASES — NECESSITY OF GOOD FAITH AND DILIGENCE.—While the trial court should be most liberal in granting continuances in divorce cases, because the public as well as the parties to the action are interested in the result of the suit, a defendant

must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

W. T. Baggett, E. L. Campbell, and W. W. Foote, for appellant.

The court erred in granting plaintiff leave to withdraw his dismissal, and had no jurisdiction to proceed with the trial of the cause. (*Thompson v. Spraid*, 66 Cal. 350; *Merritt v. Campbell*, 47 Cal. 542; *Grimes v. Chamberlain*, 27 Neb. 605.) The court erred in refusing the defendant a continuance. The discretion confided to the court is a legal discretion, to be exercised, not capriciously or arbitrarily, but by fixed legal principles, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. (*Bailey v. Taaffe*, 29 Cal. 424; *Lybecker v. Murray*, 58 Cal. 189; *Stringer v. Davis*, 30 Cal. 322; *Purinton v. Frank*, 2 Iowa, 565; *State v. Painter*, 40 Iowa, 298; *Ex parte Marks*, 49 Cal. 681; *Ex parte Hoge*, 48 Cal. 5; *N. G. Bank v. Colwell*, 8 N. Y. Sup. 380; *Carter v. Wharton*, 82 Va. 264; *Harries v. Roebuck*, 47 N. J. L. 228; *Wright v. Lacy*, 22 Minn. 466.) Courts are extremely liberal in granting adjournments, even when simply expedient, and much more when any necessity exists. (*Turner v. Morrison*, 85 Cal. 251.) The public has an interest in such cases, and the court should afford both parties the fullest possible hearing in such matters. (*McBlain v. McBlain*, 77 Cal. 509; *Wadsworth v. Wadsworth*, 81 Cal. 183; 15 Am. St. Rep. 38; *Cottrell v. Cottrell*, 83 Cal. 460; *Stewart on Marriage and Divorce*, sec. 327.) The finding of the court that the defendant inflicted upon the plaintiff grievous mental suffering is wholly without

support from, and is wholly contrary to, the evidence produced. This is a conclusion of law. (*Waldron v. Waldron*, 85 Cal. 251.)

W. S. Hinkle, for Respondent.

By the mere filing of the order of dismissal the action was not dismissed so as to deprive the court of control over the cause, as a judgment of dismissal was never entered thereon. (*Page v. Superior Court*, 76 Cal. 372; *Page v. Page*, 77 Cal. 83; *Estate of Cook*, 77 Cal. 220-232; 11 Am. St. Rep. 267.) The affidavit of an attorney of a party that he is "informed and believes" as to any fact in issue is not evidence which could properly have any persuasive influence on the court. (*Barnard v. Wilson*, 66 Cal. 253; *People v. Jenkins*, 56 Cal. 5; *Pope v. Dalton*, 31 Cal. 218.) The whole case showed that the defendant wished the court to continue the trial of a case which had been three times set for trial, because she was traveling with an opera bouffe company, which was expected to bring up in San Francisco some time during the month of January, and that her claim of sickness was a transparent sham. There was no abuse of discretion in proceeding with the trial under such a state of facts. (*Frank v. Brady*, 8 Cal. 47; *Musgrove v. Perkins*, 9 Cal. 212; *Canal Co. v. Chapman*, 11 Cal. 161; *Griffin v. Polhemus*, 20 Cal. 181; *People v. De Lacy*, 28 Cal. 590; *People v. Gaunt*, 23 Cal. 156; *Hastings v. Hastings*, 31 Cal. 95; *Wilkinson v. Parrott*, 32 Cal. 102; *Harper v. Lamping*, 33 Cal. 641; *Carey v. P. & C. Pet. Co.*, 33 Cal. 694; *People v. Mortimer*, 46 Cal. 114; *Kern Valley Bank v. Chester*, 55 Cal. 49.) The false and malicious charges made by the defendant against the plaintiff entitled him to the relief awarded by the court. (*De Haley v. De Haley*, 67 Cal. 24; 74 Cal. 491; 5 Am. St. Rep. 460; *Powelson v. Powelson*, 22 Cal. 358; 1 Bishop on Marriage and Divorce, 730; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773; *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 604; *Holyoke v. Holyoke*, 78 Me. 404; *Popkin v. Popkin*, 1 Hagg. Ecc. 765.) While

it is to be observed that causes both physical and mental render the infliction of cruelty by the wife on the husband less common than by him on her, yet the law, equally in England and in most of our states, gives the same relief to a complaining husband as to a complaining wife. (*Kirkman v. Kirkman*, 1 Hagg. Const. 409; *Waning v. Waning*, 1 Phillim. 132; 1 Eng. Ecc. 210; *White v. White*, 1 Swab. & T. 591; *Lynch v. Lynch*, 33 Md. 328; *Kempf v. Kempf*, 34 Mo. 211; *Jones v. Jones*, 66 Pa. St. 494.)

The COURT.—Action for divorce upon the ground of extreme cruelty. Judgment was entered in favor of plaintiff, and the defendant appeals.

1. After the filing of the complaint in this action, and before any appearance on the part of defendant, the attorney for plaintiff filed with the clerk of the superior court a paper properly entitled in the cause, and stating, "The above-entitled action is hereby dismissed," but no judgment of dismissal was entered. It is claimed by appellant that upon the filing of this paper the court lost jurisdiction of the action, and that jurisdiction was not restored by the subsequent appearance and answer of defendant. This objection to the jurisdiction of the court was made in various forms in the court below, and overruled. The court did not err in its rulings upon this point. The filing of the paper referred to was in effect an order for a dismissal of the action, and would have been sufficient authority for the clerk to have entered a judgment of dismissal, but until the entry of such judgment the court retained jurisdiction of the case. (*Page v. Superior Court*, 76 Cal. 372; *Acock v. Halsey*, 90 Cal. 215; *Rochat v. Gee*, 91 Cal. 355).

2. It is urged by appellant that the facts alleged in the complaint and found by the court do not entitle plaintiff to the decree, which he obtained, dissolving the marriage which existed between him and appellant. The cruelty alleged and found is, that appellant inflicted grievous mental suffering upon plaintiff, by imputing to

him, in the presence of others, the grossest immorality and personal impurity. It is not necessary to state here, with any particularity, the language by which these charges were made. It is sufficient to say that such charges, if false, were well calculated to bring upon a person of ordinary sensibility grievous mental suffering. But it is not alleged in the complaint, nor is it found by the court, that the charges of which plaintiff complains had any injurious effect upon his health, and for this reason it is claimed that the complaint and findings do not support the judgment, under the law as declared by this court in *Waldron v. Waldron*, 85 Cal. 251. It was held in that case that a finding to the effect that the defendant had inflicted upon the plaintiff therein grievous mental suffering, but without injury to her health, was not equivalent to a finding of extreme cruelty upon the part of the defendant, and would not sustain a judgment for divorce upon that ground; and in discussing the question as to what constitutes such extreme cruelty as will justify a divorce, the court said: "Although the character of the ill treatment, whether it operates directly upon the body, or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of the sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party." And it was further said in that case, "that the practical view of the law is, that a degree of cruelty which cannot be perceived to injure the body or the health of the body 'can be practically endured,' and *must* be endured if there is no other remedy than by divorce; because no 'scale' by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their *perceptible* effects upon the physical organization of the body."

Tested by this rule, it must be conceded that the findings here are insufficient to sustain the judgment. But

the case from which we have just quoted was decided by a bare majority of the court as it was then constituted, and while the conclusion there reached finds support in many earlier cases cited in the opinion, we do not think it can be sustained without a wide departure from the letter and spirit of section 94 of the Civil Code of this state, which declares: "Extreme cruelty is the infliction of grievous bodily injury *or* grievous mental suffering upon the other by one party to the marriage." The language of this section is plain, and cannot be properly construed as declaring that only grievous bodily injury shall constitute extreme cruelty, and that extreme mental suffering which is not shown to have injuriously affected the body or health of the complaining party is not sufficient. The tendency of modern decisions, reflecting the advanced civilization of the present age, is to view marriage from a different standpoint than as a mere physical relation. It is now more wisely regarded as a union affecting the mental and spiritual life of the parties to it, — a relation designed to bring to them the comfort and felicities of home life, and between whom, in order to fulfill such design, there should exist mutual sentiments of love and respect. "It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, . . . *or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes.*" (*Carpenter v. Carpenter*, 30 Kan. 744; 46 Am. Rep. 108.) Section 94 of the Civil Code is in harmony with the law as thus stated, and under it the infliction of grievous mental suffering is extreme cruelty. It may be true that there is "no scale by which to gauge the purely mental sus-

ceptibilities and sufferings" of another, nor is it necessary that there should be any such exact measure. The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given case there has been inflicted this "grievous mental suffering" is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given. As said by Mr. Justice McFarland, in his dissenting opinion in *Waldron v. Waldron*, 85 Cal. 251: "Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend—as most cases depend—upon the sound sense and judgment of juries and courts."

We cannot say in this case that the court was not fully justified in finding that the conduct of the defendant inflicted upon plaintiff grievous mental suffering, as alleged in the complaint.

The evidence was sufficient to sustain the finding of the court that plaintiff had been a resident of the state for more than six months prior to the commencement of the action.

The refusal of the court to grant a continuance cannot be held to be an abuse of discretion. In *Kneebone v. Kneebone*, 83 Cal. 647, the court said: "It is settled law in this state that applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal, unless the record affirmatively shows that it abused its discretion. In *Musgrove v. Perkins*, 9 Cal. 212, the court, per Field, J., said: 'The granting or refusing a continuance rests in the sound discretion of the court below, and its ruling

will not be revised, except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than the appellate court, and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed.' And similar language has been used in many subsequent decisions." This action was commenced on May 14, 1889. The defendant was personally served with summons nine days later, and on June 21st she appeared and demurred to the complaint. On July 28th the demurrer was withdrawn, and the defendant was allowed thirty days in which to answer the complaint. She procured further extensions of time, and filed an answer and cross-complaint on October 15, 1889. An application was made on the 16th of October to have the cause set for trial, but by reason of the illness of the presiding judge, the hearing of the motion was postponed until the 25th, when the cause was set for trial on December 2d following. Counsel for defendant objected to the order of the court setting the case for trial on December 2d, on the ground that it would be necessary to take the depositions of witnesses residing in New York; that defendant was an actress by profession, and dependent upon herself for a living, and that her senior counsel would be necessarily absent from the state for about a month. Counsel for plaintiff stated that he would waive service of notice for the issuance of the commission to take depositions, and thereupon the order was made as stated. An application was made on December 2d for a continuance until the fifteenth day of January, 1890, and the cause was continued until the sixth day of December, 1889, at which time the motion for a continuance to January 15th was made and denied. The commission to take depositions was not issued until the eighteenth day of November, 1889. When the cause came on for trial, December 6, 1889, counsel for defendant filed an affidavit, and in connection therewith several letters and telegrams received from the defendant,

as a basis for his motion for a further continuance until January 15th. It is apparent from the language of the court in denying this last motion that it believed the defendant was not acting in good faith, but was endeavoring to postpone the action of the court until her business engagements would bring her to San Francisco, and we cannot say that such conclusion may not have been fairly drawn from all the circumstances of the case. Defendant had actual notice more than six months prior to the day of the trial of the charge which plaintiff made against her, and the cause was at issue nearly two months before the trial occurred. It appears from the letters and telegrams that the defendant was at Minneapolis, Minnesota, November 15th; Milwaukee, Wisconsin, November 19th; Marshalltown, Iowa, November 22d; Des Moines, Iowa, November 23d; Kansas City, November 26th and 27th; St. Louis, December 2d, 4th, and 6th; and was informed at these times of all that had occurred. The court doubtless concluded that if the defendant could thus travel about in the East she was able to make the trip to San Francisco in time to be present at the trial; and as stated before, we cannot say that its order was an abuse of discretion. It has been held here that there is no abuse of discretion in refusing a motion for a continuance if the circumstances cast suspicion on the good faith of the application, and induce the belief that it was intended only for delay. (*People v. Mortimer*, 46 Cal. 120.)

While the trial court should be most liberal in granting continuances in divorce cases, because the public as well as the parties to the action are interested in the result of the suit, a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience.

The judgment and order are affirmed.

DE HAVEN, J., dissenting.—I dissent from the judg-

ment, and from so much of the foregoing opinion as holds that the action of the court below in denying the motions of defendant for a continuance was not an abuse of discretion.

The defendant is a non-resident of the state, and her answer was filed October 15, 1889, and on the 25th of that month the court, on motion of plaintiff, and against the objection of defendant, set the case for trial on December 2, 1889; and afterwards the time for trial was continued by consent until December 6, 1889, without prejudice to the right of defendant to move for a further continuance. Upon that day the defendant moved for a continuance of the case until January 15, 1890. The motion was upon the ground that depositions of certain witnesses had not been returned, and also for the alleged reason that defendant was ill at Kansas City, Missouri, and unable to come to San Francisco without endangering her prospects for recovery. This motion was supported by the affidavit of one of her attorneys, which stated among other things, "that affiant is further informed by telegrams received from defendant on the twenty-third, twenty-sixth, and thirtieth days of November 1889, and also from affidavits of Dr. J. C. Rogers, hereto attached, and affiant believes, and thereupon states, that defendant is now ill at Kansas City, Missouri, and unable to travel without danger to her health." Accompanying this was the affidavit of defendant herself and her physician, to the same effect. Many telegrams from defendant to her attorney were also produced. I am unable to find anything in the record which directly contradicts the facts stated in these affidavits in regard to the state of defendant's health. That which comes the nearest doing so is found in the statement or affidavit of plaintiff's father, wherein it is said: "I am informed and believe that she is now performing as an opera bouffe artist with a company, and has been doing so for many months, and is not too sick to come here or travel." Manifestly, this is not an assertion that the defendant was not in fact sick, as stated in the affidavits of herself

and physician; but it is argued that the telegrams dated at different places show that she was traveling with her company, and therefore that she was not sick. These telegrams certainly show that she had not severed her connection with the company, and that she was able to travel between the places, but it does not necessarily follow, because she did this, that it would have been prudent for her to attempt the longer overland journey. The motion for a continuance until January 15th was denied, and upon the next day the defendant moved for a continuance for one week. The motion was made upon the same affidavits, and additional telegrams and a letter from defendant. One telegram was dated upon the previous day, December 6th, and is as follows: "Allow sufficient time for traveling. Last notice too short. Fight for continuance. Telegraph early." The letter was dated December 2, 1889, and was addressed to her attorney. In it she said: "I am very anxious to hear definitely about the trial; I am unable to take so long a journey alone at present. I have worried myself ill, until nervous prostration got the better of me. I am also suffering from rheumatism. I must give notice this week to the company, if I intend to remain with them and open January 13th in San Francisco. I can't put them off in this matter. I can't hear from you, and every night they send for decided answer, and I am unable to decide. If I come to San Francisco, I give up my engagement in the middle of winter. You say nothing about the divorce being granted to me if I accept settlement. I have done nothing to grant a divorce, but if there is no other alternative I must." This motion was also denied, and in so doing, as well as in its denial of the previous motion, I think the court erred. The defendant was a non-resident of the state, an actress by profession, and under engagement as such, and while it appears from the letters and telegrams to her counsel that she did not wish to break this engagement if she could avoid it, and that this was one reason why she may have desired a postponement of the trial, still, there is

nothing in these letters and telegrams to warrant the inference that she and her counsel were acting in bad faith with the court in asking for a continuance upon the ground of the state of her health, as represented in the affidavits of herself and physician, or that such affidavits were untrue.

In actions for divorce, public policy imperatively requires that nothing should be done in haste. The public are interested in having no divorce granted except for adequate cause, and the surest way to determine whether there is good cause or not is to hear both sides. In accordance with this rule, it has always heretofore been held by this court that when an application is made to set aside a judgment of default, and for leave to answer in such an action, a more liberal rule is to be applied than in other cases, in which only private rights of property are involved. Thus in the case of *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. Rep. 38, this court reversed the action of the lower court in refusing to set aside a default, although it was admitted that the appellant had been guilty of such negligence as would in an ordinary action have deprived her of the right to such relief. The court there said: "So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in *McBlain v. McBlain*, 77 Cal. 509. In that case the court, per Paterson, J., said: 'The parties to the action are not the only people interested in the result thereof; the public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.' In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while in an ordinary action the neglect shown might be sufficient to deprive her of a right to relief, yet in this kind of case a more liberal rule should prevail."

It is plain to my mind that if the court below had kept in view the rule as thus declared, it would not have

denied to the absent defendant a continuance for one week, which would have afforded her an opportunity to be present and give evidence in her own defense, more especially when such motion was based upon the solemn affidavit of her counsel, in which he assured the court, upon his information and belief, "that it was the intention of the defendant to be present in San Francisco, at said trial, on December 2, 1889, and that she was and is prevented therefrom by her said illness, and not otherwise."

It is very apparent from all of the telegrams, letters, and affidavits submitted to the court, that the defendant desired to be present at the trial, and neither of the motions for a continuance called for any unreasonable delay, and there is nothing in this record to show that plaintiff could possibly have been injured if either of them had been granted. Under such circumstances, the refusal of the court to postpone the trial was error, and not within the limits of that judicial discretion which the law intends shall govern and restrain courts in their rulings upon such questions, and which discretion is never capricious, arbitrary, or unjust, but is always "exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice." (*Bailey v. Taaffe*, 29 Cal. 424.)

Whatever cause may have existed for a divorce in this case, or however unwise or unfortunate the marriage between the parties may have been in the first instance, I can find in such facts no justification for bringing on the trial against a non-resident woman, in fifty-three days after issue joined, in the face of a demand for the limited and reasonable postponement asked for by her counsel, and which motions for such purpose, it must be presumed from this record, were made in good faith. The marriage was a lawful one, and gave to the defendant rights of which she should not be deprived without full and complete opportunity for defense.

The judgment and order should be reversed.

HARRISON, J., and BEATTY, C. J., concurred in the dissenting opinion of Mr. Justice De Haven.

Rehearing denied.

[No. 18006. In Bank. — June 18, 1892.]

HENRY D. P. ALLEN, APPELLANT, v. CHARLES F. ALLEN ET AL., RESPONDENTS.

STATUTE OF LIMITATIONS—CAUSE OF ACTION BARRED IN ANOTHER STATE — PLEADING — CONSTRUCTION OF CODE. — It is not necessary for a defendant who claims that the cause of action is barred by limitation, under section 861 of the Code of Civil Procedure, to set out the facts upon which he relies to show that the cause of action arose in another state, and that under the laws of that state it would be barred by the statute of limitations, but it is sufficient if he states generally that the cause of action is barred by that section. The rule of pleading established by section 458 of the Code of Civil Procedure applies to section 861 of that code.

DEED AS SECURITY FOR LOAN—CONTRACTS MADE OUT OF STATE—CONSTRUCTION—CONFLICT OF LAWS.—In the construction of a deed to land in this state, executed out of the state, as security for the repayment of money advanced, the laws of this state existing at the time the deed was executed must be read as a part thereof, and must govern the right to foreclose and to redeem, although the contract of loan is to be construed according to the laws of the state where it was made.

ID. — REMEDIES UNDER LAWS OF NEW YORK — STATUTE OF LIMITATIONS — ACTION TO REDEEM—LAW OF CALIFORNIA—DEED PASSING TITLE. — Where such deed and contract of security were executed in the state of New York, between residents of that state, either party could have maintained an action in that state on the contract, the one to enforce the right to redeem, and the other to recover the amount for which the land was held as security; and when the action in that state to recover the debt became barred by the laws of that state, no action to redeem from the security could thereafter be maintained in this state, where it appears that, by the law in force in this state at the time of the execution of the deed, the legal title passed to the grantee by the deed, and the right to redeem was barred whenever the debt to secure which the deed was made became barred by the statute of limitations.

ID. — RIGHT OF REDEMPTION — LAW OF CALIFORNIA IN FORCE AT DATE OF DEED — SUBSEQUENT CHANGE OF LAW. — The right of the grantee of the deed of land in this state, intended as security, to redeem therefrom, and the time within which redemption might be made, were fixed by the laws of this state in force at the time of the execution of the deed; and no subsequent legislation could change the rights or obligations of the parties, or extend the time for action, section 846 of the Code of Civil Procedure having been enacted after the execution of the deed, and the

decisions based on that section do not apply in determining the effect of the deed.

2d. — LAWS OF NEW YORK IMMATERIAL — INTEREST IN LAND — LEX LOCI REI SITAE.— It is immaterial whether by the laws of the state of New York, where the deed of land in this state was executed, an action to redeem the land under the contract for security could be maintained in that state, although an action for the recovery of the money due was barred, since the interest of each party in the land is governed by the *lex loci rei sitae* in force at the time of the execution of the deed, and the right to redeem is governed by the laws of this state then in force.

3d. — EFFECT OF OVERRULED DECISIONS — DEED PASSING TITLE.— The decisions of the supreme court of this state do not make or change the law, but simply declare what the law is, and overruled decisions declaring that a conveyance absolute in form but intended merely as security did not pass the legal title to the grantee, not having stated the law correctly as declared in later cases, cannot be considered as forming part of a conveyance executed after the making of the earlier decisions, and before they were overruled, and do not furnish the true rule of interpretation thereof.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

J. N. Gillett, E. W. Wilson, and Stanley, Stoney & Hayes,
for Appellant.

The finding of the court upon the plea of the statute of limitations was entirely without any issue presented in the pleadings, and this court cannot consider it, as the defendants never in any form pleaded the laws of the state of New York. They did plead section 361 of our code, but this cannot be considered a pleading of the laws of the state of New York. The statute or law upon which they depended must be set out *in hæc verba*, or else it will not be considered as pleaded. (*Gillett v. Hill*, 32 Iowa, 220; *Hoyt v. McNeil*, 13 Minn. 390; *Norris v. Harris*, 15 Cal. 255.) The plaintiff might have had two causes of action, one upon a personal demand, which might be enforced in the state of New York, and the other by a foreclosure, under the laws of the state of California. A selection of one remedy was a waiver of the other. If the personal demand is barred,

under the laws of the state of New York because of a failure to elect that remedy, the defendants may still elect to foreclose their mortgage here, and to which suit the plaintiff could not successfully plead the statutes of limitation. (*Ould v. Stoddard*, 54 Cal. 613.) That they could still enforce the remedy upon their mortgage, although the debt be barred, does not now admit of a doubt. (*Henry v. Confidence Co.*, 1 Nev. 619; *Mackie v. Lansing*, 2 Nev. 302; *Cookes v. Culbertson*, 9 Nev. 199; *Mich. Ins. Co. v. Brown*, 11 Mich. 265.) It is now a well-settled rule of law, that acts of limitation, unless they expressly discharge the debt, are simply a part of the remedy. (*Carson v. Hunter*, 46 Mo. 467; 2 Am. Rep. 520; *Miller v. Brenham*, 68 N. Y. 83; *State v. Swope*, 7 Ind. 91; *Meek v. Meek*, 45 Iowa, 294; *McElmoyle v. Cohen*, 13 Pet. 312; *McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170; *De Cordova v. Galveston*, 4 Tex. 470.) The instrument in this case was and is a mortgage, executed in the state of New York, upon lands situated in the state of California. Under such circumstances, the nature, construction, and validity of the contract is to be governed by *lex loci contractus*, while all matters pertaining to the remedy, or the enforcement of the contract, must be determined by *lex fori*. (*Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Swank v. Hufnagle*, 111 Ind. 453; *Goddard v. Sawyer*, 9 Allen, 78; *United States v. Crosby*, 7 Cranch, 115; *Or. & Wash. Tel. Co. v. Rathbun*, 5 Saw. 32; 1 Jones on Mortgages, sec. 823; *Farmers' Loan & Trust Co. v. Postal Tel. Co.*, 55 Conn. 334; *Burchard v. Dunbar*, 82 Ill. 450; 25 Am. Rep. 334.) As the court found that the plaintiff was continuously a resident of New York, and absent from California from 1865 to 1885, and that the defendant was never in California until 1886, the action was not barred, and could be enforced at any time within four years after that period. (Code Civ. Proc., sec. 351; *Graves v. Weeks*, 19 Vt. 178; *Petchell v. Hopkins*, 19 Iowa, 531; Wood's Cal. Digest, art. 22, sec. 22.) Article 22, section 22, of Wood's California Digest, above cited, is now section 351 of the Code of Civil Procedure. Both provisions declare that

"if when a cause of action accrues against a person he is out of the state, the action may be commenced within the term herein limited [four years] after his return to the state." It is therefore clear that this section saved the plaintiff's cause of action. We are not, however, called upon to look further than the law in force at the time the action was brought, since that law governs the case (*Winston v. McCormick*, 1 Ind. 56; *State v. Swope*, 7 Ind. 91; *Sampson v. Sampson*, 63 Me. 328.) Again, the mortgage was made and delivered in 1869. At that date the period of limitation was four years. The Code of Civil Procedure went into effect less than four years after the execution and delivery of the mortgage. (Wood's Cal. Digest, art. 17, sec. 17; Code Civ. Proc., sec. 2.) Section 346 was incorporated in the code, and under it the plaintiff has the right to bring his action to redeem from the mortgage at any time, or until the defendants have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. (Code Civ. Proc., sec. 346; *Warder v. Ensler*, 73 Cal. 291.) The bar of the statute not then having become complete, the effect of this provision was to extend the plaintiff's right to commence his action for an indefinite time. The equity of redemption was inseparably connected with the mortgage. The right to redeem and to foreclose were co-existent, and the right to redeem could be exercised until the remedy of foreclosure was barred. (*Montgomery v. Spect*, 55 Cal. 352; *Taylor v. McClain*, 60 Cal. 651.) Even admitting that the plea of the bar was meant to cover the ultimate fact that the action was barred, still it is fatally defective, as it neither alleges that the cause of action arose in New York, nor that the period of time prescribed by that law had elapsed at the commencement of the action. (*Headington v. Neff*, 7 Ohio, 229.) The only evidence introduced upon which such finding could have been based was section 91 of the New York Code of Procedure, but the action is governed by section 97, and not by section 91. (*Minor v. Beekman*, 50 N. Y. 337; *Hubbell*

v. *Sibly*, 50 N. Y. 468.) As the plaintiff seeks to pay the mortgage, he is entitled to have the cloud removed from his title, independent of the statute of limitations. (*De Cazara v. Orena*, 80 Cal. 132; *Hall v. Arnot*, 80 Cal. 348.) It was, prior to the execution and delivery of the mortgage in this case, and has since been, the law of this state, that if when a cause of action accrues against a person he is out of the state, the action may be commenced within the term herein limited after his return to the state. (Code Civ. Proc., sec. 351; Wood's Cal. Digest, art. 22, sec. 22.) As the legal title never passed from the plaintiff, and the defendants were never in possession, no laches could be imputed to the plaintiff. (*Williams v. Conger*, 49 Tex. 582.) Under section 260 of the old Practice Act, which is now section 744 of the Code of Civil Procedure, our supreme court, by an unbroken line of decisions from April, 1858, down to April, 1870, held that a mortgage, whatever its terms, was a mere security, and conveyed no title to the mortgagee. (*McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428; *Haffley v. Maier*, 13 Cal. 13; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Fogarty v. Sawyer*, 17 Cal. 589; *Lord v. Morris*, 18 Cal. 488; *Dutton v. Warschauer*, 21 Cal. 609; 82 Am. Dec. 765; *Grattan v. Wiggins*, 23 Cal. 16; *Cunningham v. Hawkins*, 27 Cal. 603; *Polhemus v. Treiner*, 30 Cal. 687; *Gay v. Hamilton*, 33 Cal. 688; *Jackson v. Lodge*, 36 Cal. 28; *Mack v. Wetzlar*, 39 Cal. 247.) As at the time the mortgage was made in 1869 it had become and was the settled law in this state that no title whatever passed to the mortgagee, no matter what the form or terms of the instrument might be, such law entered into and became a part of the mortgage, although there was no express stipulation to that effect. (Bishop on Contracts, sec. 565, 566; *Brine v. Ins. Co.*, 96 U.S. 627; *Edwards v. Kearzey*, 96 U. S. 595.) Although after the execution and delivery of this mortgage, in the cases of *Espinosa v. Gregory*, 40 Cal. 58, and *Hughes v. Davis*, 40 Cal. 117, the supreme court apparently changed the rule

established in its many prior decisions, and thereupon held that an absolute deed intended as a mortgage conveyed the legal title, yet since the rendering of those decisions the court has returned to the doctrine announced in its many earlier decisions, and with them now holds that a deed absolute in form, given merely to secure an indebtedness, is a mortgage, and does not pass the legal title to the premises. (*Taylor v. McLain*, 64 Cal. 514; *Healey v. O'Brien*, 66 Cal. 517; *Raynor v. Drew*, 72 Cal. 307; *Booth v. Hoskins*, 75 Cal. 271; *Smith v. Smith*, 60 Cal. 323; *Hall v. Arnot*, 80 Cal. 348.) The respondents were not only mortgagees, but trustees of the appellant. The legal title had been conveyed to them by John H. Allen, appellant's trustee, and accepted by them with a knowledge of and subject to the trust. It is a principle of equity, that the holder of an equitable title—for example, the beneficiary of a trust—can be divested of his equitable title by adverse possession only. (*Gilbert v. Sleeper*, 71 Cal. 290; *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523; *Love v. Watkins*, 40 Cal. 571; 6 Am. Rep. 624; *Coulson v. Wallom*, 9 Pet. 81; *Harris v. King*, 16 Ark. 122; *Wood on Limitations*, c. 17, sec. 219; *Vauck v. Edwards*, 11 Paige, 291.) The plaintiff was not guilty of laches, as the defendant made no claim to the premises adverse to the plaintiff's right to a conveyance. Mere delay will not defeat a recovery, unless the trustee has repudiated or disavowed the trust, and the disavowal is known to the *cestui que trust*. (*McPherson v. Hayward*, 81 Me. 329; *Springer v. Springer*, 114 Ill. 550; *Broder v. Conklin*, 77 Cal. 330; *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523; *Thomas v. Merry*, 113 Ind. 83.)

S. M. Buck, and *J. D. H. Chamberlin*, for Respondents.

The deed from John H. Allen transferred the legal title to the lands in controversy. (*Fuquay v. Stickney*, 41 Cal. 583-587; *Partridge v. Shepherd*, 71 Cal. 478; *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480; *Durkin v. Burr*, 60 Cal. 360.) Under the allegations of the com-

plaint, the plaintiff cannot redeem the land, and the court cannot decree that the defendants hold the legal title in trust for the plaintiff. (*Taylor v. McLain*, 64 Cal. 513; *De Cazara v. Orena*, 80 Cal. 134; *Mondran v. Goux*, 51 Cal. 153; *Boone v. Chiles*, 10 Pet. 209; *Rathbun v. Rathbun*, 6 Barb. 107; *Green v. Covillaud*, 10 Cal. 332; 70 Am. Dec. 725; *Morenhout v. Barron*, 42 Cal. 605; *Gregory v. Nelson*, 41 Cal. 284; *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492; *Murdock v. Clarke*, 59 Cal. 683-693.) Plaintiff's cause of action is barred by section 361 of the Code of Civil Procedure. The legal title being in defendants, the statute commenced running in 1869. And when defendants' cause of action to recover the money advanced to plaintiff became barred, then any cause of action plaintiff may have had to redeem became barred also. (2 Jones on Mortgages, sec. 1146; *Cunningham v. Hawkins*, 24 Cal. 403; 85 Am. Dec. 73; *Grattan v. Wiggins*, 23 Cal. 16-35; *Arrington v. Liscom*, 34 Cal. 366; 94 Am. Dec. 722; *Koch v. Briggs*, 14 Cal. 257; 73 Am. Dec. 651.) And this rule has never been changed in this state, in cases where the title has passed to the mortgagee. (*Taylor v. McClain*, 60 Cal. 651.) The effect of section 361 of the Code of Civil Procedure is to permit a defendant who is sued here by one who has not been a citizen of this state, and upon a contract made in another state, to plead the statute of limitations of such state, when more favorable to him than our own. Section 361 of the Code of Civil Procedure is like the statute of Illinois; and that has been so construed. (*Osgood v. Artt*, 10 Fed. Rep. 365.) Like statute of New York also. (*Penfield v. Chesapeake*, 29 Fed. Rep. 494; 134 U. S. 352.) The laws of this state which existed at the date of the deeds, and which created and defined the legal and equitable obligations of the parties arising out of the loan and the execution of the deeds as security therefor, are to be read as forming part of the contract itself. (Bishop on Contracts, secs. 565, 566; *Bronson v. Kinzie*, 1 How. 319.) They were the laws of Illinois at the time, and therefore entered into the contract, and

formed a part of it, without any express stipulation to that effect in the deed, and any subsequent law impairing the rights thus acquired impairs the obligation which the contract imposed. (*Von Hoffman v. City*, 4 Wall. 550.) At the time these deeds were executed, being absolute in form, although intended as security only, they transferred the legal title, and there was left in the person executing it a mere equity of redemption. (*Hughes v. Davis*, 40 Cal. 117.) And whenever the debt to secure which the deed was made became barred by the statute of limitations, the right to redeem was also barred. (*Espinosa v. Gregory*, 40 Cal. 58.) Such a deed conveyed the legal title, subject only to be defeated in equity by the affirmative action of the grantor or mortgagee within the time and in accordance with the principles governing courts of equity. And in a court of equity the right to foreclose and the right to redeem were always regarded as reciprocal, and if one was barred so was the other. (*Cunningham v. Hawkins*, 24 Cal. 403; 85 Am. Dec. 73; *Arrington v. Liscom*, 34 Cal. 366; 94 Am. Dec. 722; *Koch v. Briggs*, 14 Cal. 257; 73 Am. Dec. 651; *Grattan v. Wiggins*, 23 Cal. 35; *Espinosa v. Gregory*, 40 Cal. 62; *Taylor v. McClain*, 60 Cal. 651.) Any law postponing the time within which the plaintiff was obliged to pay in order to preserve his equity impaired the obligation of the contract. (*Louisiana v. New Orleans*, 102 U. S. 207; *January v. January*, 7 T. B. Mon. 542; 18 Am. Dec. 211; *Goenen v. Schroeder*, 8 Minn. 387; *Boice v. Boice*, 27 Minn. 371; *Greenfield v. Dorris*, 1 Sneed, 548; *Robinson v. Howe*, 13 Wis. 341.) The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and void. (*Edwards v. Kearzey*, 96 U. S. 595, 607.) The laws relating to enforcement of a contract are part thereof. (*Edwards v. Kearzey*, 96 U. S. 601; *Robinson v. Magee*, 9 Cal. 81, 84; 70 Am. Dec. 638; *Smith v. Cleveland*, 17 Wis. 568.) In

this case the legal title to the property vested in defendants. The legislature had no power to divest it and confer it upon plaintiff. (*Helen v. Webster*, 85 Ill. 116; *Koenig v. Omaha*, 3 Neb. 383; *Dewey v. Lambier*, 7 Cal. 347; *Stafford v. Lick*, 7 Cal. 480.) A power to impose conditions after a contract is complete and perfect, is but the power to impair its obligation. (*Robinson v. Magee*, 9 Cal. 81, 82; 70 Am. Dec. 638.) An act of the legislature divesting the title of the purchaser of property previously mortgaged by his grantor, by a foreclosure suit in which the mortgagor alone was a party defendant, would not be constitutional. (*Skinner v. Buck*, 29 Cal. 253.) The legislature cannot alter or repeal an act so as to affect contracts made during the existence of the act. (*Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.) The remedy enters into and forms a material part of the obligation of a contract. (*Walker v. Whitehead*, 16 Wall. 314; *Gunn v. Barry*, 15 Wall. 610; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *Scaine v. Belleville*, 39 N. J. L. 526. And a statute can no more impair the efficacy of a contract by changing the remedy than attack its vitality in any other way. (*Smith v. Morse*, 2 Cal. 524; *Johnson v. Duncan*, 3 Mart. 531; 6 Am. Dec. 675; *Coffman v. Bank*, 40 Miss. 29; 90 Am. Dec. 311; *Curran v. Arkansas*, 15 How. 304; *Butz v. Muscatine*, 8 Wall. 583; *Walker v. Whitehead*, 16 Wall. 314; *Olcott v. Supervisors*, 16 Wall. 678; *Gunn v. Barry*, 15 Wall. 623; *Edwards v. Kearzey*, 96 U. S. 601; *Taylor v. Stearns*, 18 Gratt. 244; *Nevitt v. Bank*, 14 Miss. 513; *Von Baumbach v. Bade*, 9 Wis. 559; *Thompson v. Commonwealth*, 81 Pa. St. 314.) The case of *Raynor v. Drew*, 72 Cal. 307, and other cases announcing a similar doctrine, based as they are upon contracts made after the code went into effect, cannot be regarded as controlling this case. The settled interpretation of the law by our supreme court in *Hughes v. Davis*, 40 Cal. 117, *Espinosa v. Gregory*, 40 Cal. 58, *Davenport v. Turpin*, 43 Cal. 604, *Pico v. Gallardo*, 53 Cal. 206, became a part of the law of this state, as much so as if incorporated into the body of it by the legislature. (*Christy v. Pridgeon*, 4 Wall. 196-203; *Union*

etc. v. Bank etc., 10 Supt. Ct. Rep. 1017.) And if at the date of the commencement of this action defendants had attempted to foreclose plaintiff's alleged equity of redemption, section 361 of the Code of Civil Procedure would be a complete defense to such action, for in this state there can be no foreclosure of a mortgage after the statute of limitation has run against the debt secured. (*McCarthy v. White*, 21 Cal. 495; 82 Am. Dec. 754; *Low v. Allen*, 26 Cal. 144.) Defendants being residents of New York, plaintiff might have brought his action against defendants there. (*Kanawha v. Kanawha*, 7 Blatch. 415; *Smith v. Larrabee*, 58 Me. 361; *Williams v. Fitzhugh*, 37 N. Y. 444; *Gardner v. Ogden*, 22 N. Y. 327, 328; 78 Am. Dec. 192.) The objection of appellants, that there was no evidence whatever to justify the finding that the action is barred by section 361 of the Code of Civil Procedure, because defendants introduced in evidence the wrong section of the New York Code, is untenable, as, even if it were so, the presumption of law takes the place of evidence; and the presumption is, that the laws of foreign countries are the same as those of this state. (*Tolman v. Smith*, 85 Cal. 280; *Marsters v. Lash*, 61 Cal. 624; *Osborn v. Blackburn*, 78 Wis. 209.)

PATERSON, J.—Appellant received from the state a certificate of purchase for the lands described in the complaint, on March 28, 1860, and in August following assigned the same to one Collins, to secure an indebtedness of thirty dollars, and thereafter a patent was issued from the state to Collins. Appellant paid Collins the amount due him; and the latter, by request of appellant, conveyed the land to John H. Allen, who paid no consideration therefor. Respondents thereafter advanced to the appellant certain sums of money for the payment of taxes which had become delinquent, and to secure the repayment to them of said sums, the appellant, on June 12, 1869, caused said John H. Allen to convey the lands to them as security for the repayment of the money they had advanced. This deed was absolute in

form. John H. Allen received no consideration for the deed. Neither of the parties has ever been in actual possession of the land. The contract of loan was oral, and no time was fixed in which appellant was to make repayment. Plaintiff never made any demand for an accounting, or any offer to redeem, prior to the year 1885, and defendants did not, prior to that time, assert any claim of title to the lands adverse to plaintiff's right to a reconveyance upon payment of the indebtedness. This action was commenced March 15, 1887. The court below rendered judgment for the defendants. A motion for a new trial was denied, and plaintiff appealed from the order and from the judgment.

1. The court below held that plaintiff's cause of action was barred by the provisions of section 361 of the Code of Civil Procedure. That section provides: "When a cause of action has arisen in another state or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held a cause of action from the time it accrued." It is claimed by appellant that under that section it was incumbent on the respondents to set out the facts upon which they rely, to show that the cause of action arose in the state of New York, and that under the laws of that state it was barred by the statute of limitations. A complete answer to this contention is found in section 458 of the Code of Civil Procedure, which provides: "In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is so barred." The rule thus established was intended to simplify the form of

pleading such defenses, and is one which the court cannot depart from on a conjecture that the legislature intended to except from its operation cases of this kind. The contract was made in New York, where all the parties resided, and neither of them was in this state thereafter until the year 1885; and it is claimed by appellant that under sections 346 and 351 of the Code of Civil Procedure, and section 2903 of the Civil Code, the respondents' right to foreclose their mortgage was not barred at the date of the commencement of this action; that appellant remained the equitable owner of the property, and his right to redeem was kept alive. Those sections read as follows:—

"Sec. 346. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage."

"Sec. 351. If, when the cause of action accrues against a person he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

"Sec. 2903. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed."

In support of this contention, counsel for appellant say, in substance: "Respondents' action to foreclose could have been brought only in this state. The word 'return,' as employed in section 351 of the Code of Civil Procedure, is applicable to persons coming from abroad, as well as to citizens who have left the state for a temporary purpose and returned thereto. The statute had

not commenced to run in 1885, because the respondents had never been in the actual occupancy of the premises. Section 2903 of the Civil Code, and section 346 of the Code of Civil Procedure, provided rules of limitation different from those which had previously been followed by the courts of this state, and those new rules are applicable to mortgages made before as well as those made after the adoption of the codes, unless the remedy was extinguished at the time the codes took effect. Respondents were not only mortgagees, but trustees of appellant; and the statute could not commence to run in their favor until an offer to redeem was made by appellant. There could be no laches on the part of appellant, because the legal title remained in him, and no adverse claim was made by respondents." These contentions cannot be lightly passed over. They deserve to receive, and they have received, our careful attention.

In the solution of the question presented as to the effect of the deed, we must read as a part of the contract the laws of this state existing at the time the contract was made (*Klinck v. Price*, 4 W. Va. 4; *United States v. Crosby*, 7 Cranch, 115); although the nature and the construction of the contract of loan, which was made in New York, are determined by the latter state. (*De Wolf v. Johnson*, 10 Wheat. 367.) It is true, an action to foreclose must be brought where the property is situated; but it does not follow that respondents could have maintained an action to foreclose at the time this suit was commenced. Both parties resided in the state of New York, where the contract was made, and either could have maintained an action there on the contract. The plaintiff could have enforced his right to redeem, and the defendants could have recovered the amount for which they held the land as security. (*Montgomery v. Spect*, 55 Cal. 352; *Kanawha Coal Co v. Kanawha & O. Coal Co.*, 7 Blatch. 415; *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Williams v. Fitzhugh*, 37 N. Y. 444.) In this state, when an action on a promissory note, secured by mortgage of the same date upon real property,

is barred by the statute of limitation, the mortgagee had no remedy upon the mortgage. (*Lord v. Morris*, 18 Cal. 482; *Heinlin v. Castro*, 22 Cal. 100.) The debt is regarded as the principal, and the mortgage is a mere incident. When the debt is barred, the remedy upon the mortgage is also barred. (*McCarthy v. White*, 21 Cal. 495; 82 Am. Dec. 754.) If, therefore, respondents could not maintain an action in New York for the recovery of the money due, they could not maintain an action in this state to foreclose the mortgage. (Code Civ. Proc., sec. 361.) At the time the conveyance was made by John H. Allen to the respondents, a deed absolute in form, but intended as a mortgage in this state, transferred the legal title, and there was left in the person executing it a mere equity of redemption; and whenever the debt to secure which the deed was made became barred by the statute of limitations, the right to redeem was barred. (*Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Cal. 58.) The right to redeem and the right of the creditor to sue on a contract were reciprocal. When one was lost, the other could not be enforced. (*Cunningham v. Hawkins*, 24 Cal. 403; 85 Am. Dec. 73; *Arrington v. Liscom*, 34 Cal. 366; 94 Am. Dec. 722; *Grattan v. Wiggins*, 23 Cal. 35.) No subsequent legislation could change the rights or obligations of the parties, or extend the time for action. The right and time to redeem were fixed by the laws in force at that time. (*Bronson v. Kinzie*, 1 How. 316; *Walker v. Whitehead*, 16 Wall. 318; *Heyward v. Judd*, 4 Minn. 483; *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266.)

Under the decisions just cited, section 346 of the Code of Civil Procedure is inapplicable, because it would effect a material change in the rights and obligations of the parties. (*Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266; *Heyward v. Judd*, 4 Minn. 483.) And for the same reason, *Raynor v. Drew*, 72 Cal. 307, and other and later cases declaring the rule stated in that section, are not in point. They are based upon that section of

the code, and it was passed posterior to the time the parties entered into the contract.

It is claimed by the appellant that the finding of the court, "that the cause of action stated in the complaint is barred by the provisions of section 361 of the Code of Civil Procedure," is not supported by the evidence. The defendant introduced in evidence section 91, chapter 3, title 1, of Waite's Annotated Code of Procedure of New York. It is not disputed that this section applies to personal actions, and supports the fourteenth finding of the court, "that by the laws of the state of New York an action upon a verbal agreement for the payment of money is barred within six months after the cause of action accrues thereon, and the right of defendants to maintain any action against plaintiff to recover the said sum of five hundred dollars, as security for which the said deeds from Cox and John H. Allen were executed to them, has been barred by the laws of said state at all times since the twentieth day of November, 1874; and the right of defendants to maintain any action against plaintiff to recover the moneys advanced by them to him, as stated in finding No. 11, has been barred by the laws of said state at all times since September 13, 1877." But it is claimed that as the appellant's cause of action is one to ascertain the amount due upon a mortgage, and that he may be permitted to pay the same and remove a cloud from his title, the section referred to does not apply to the case, but is governed by section 97, which provides that an action for relief not otherwise provided for must be commenced within ten years after the cause of action shall have accrued. As we have seen, however, as soon as the debt is barred the remedy upon the mortgage is lost. Respondents could not have maintained an action in New York for the recovery of the money due. They therefore could not maintain an action in this state to foreclose the mortgage, and the right to redeem was lost; and as the right to redeem and the right to maintain an action on the contract are reciprocal, the fourteenth finding of the court, which is not attacked, is

conclusive against the plaintiff's right to maintain this action. If it be conceded that in New York an action to redeem from a mortgage of lands situated in that state can be maintained, although an action for the recovery of the money due could not be maintained there, the result must be the same, because, as stated before, the effect of this deed depends upon the laws of this state, existing at the time the contract was made. The interest of each party in the land was measured and controlled by the *lex loci rei sitæ*. (*Klink v. Price*, 4 W. Va. 4; *United States v. Crosby*, 7 Cranch, 115.) The right to redeem is governed by the laws of this state.

It is claimed that at the time the contract was entered into, it was the established rule in this state that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee. It is true, there had been decisions to that effect; but in the year following it was held (*Espinosa v. Gregory*, 40 Cal. 58, and *Hughes v. Davis*, 40 Cal. 117) that a deed absolute in form, intended as a mortgage, did convey the legal title. These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is. The courts cannot make or repeal a law. "They can say what a law means; and if afterwards they see that they have made a mistake, they can correct their error by an overruling of a former decision, the consequence of which overruling is that the blunder is thenceforward deemed never to have been law." (Bishop on Contracts, sec. 569.)

It has been held here, that although it appears the parties have entered into a contract relying upon a previous decision of the supreme court, they would not be relieved from the obligations thereof because of a subsequent decision by the same court, overruling the former one, and declaring a different rule upon the same subject. (*Kenyon v. Welty*, 20 Cal. 637; 81 Am. Dec. 137.) There are some cases in which the supreme court of the United

States has held that the construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct, so far as contracts made under the act are concerned, and no subsequent decision altering the construction can impair their validity. The construction becomes a part of the statute, — as much so as if it were an amendment made by the legislature. (*Gelpcke v. Dubuque*, 1 Wall. 175; *Louisiana v. Pillsbury*, 105 U. S. 294; *Douglass v. Pike*, 101 U. S. 677; *Thomson v. Lee*, 3 Wall. 327.) These cases, however, all involved the question as to the validity of negotiable securities.

We think that the case of *Oullahan v. Sweeney*, 79 Cal. 357, is distinguishable from the case at bar. The amendment therein referred to simply required the purchaser of property sold for delinquent taxes to serve upon the owner of the property a notice stating that the property had been sold for delinquent taxes, the date of the sale, the amount for which it was sold, the amount then due, the time when the right of redemption would expire, and when the purchaser would apply for a deed. This requirement was a mere incident to the right of the purchaser to receive a deed; it merely prescribed the manner in which he should proceed to demand the deed to which he was entitled. It was conceded, "for the purposes of the case, that the legislature cannot make an absolute extension of the time for redemption of property previously sold."

We think the court below held the right view of the case, and the judgment and order are therefore affirmed.

McFARLAND, J., HARRISON, J., GAROUTTE, J., and DE HAVEN, J., concurred.

SHARPSTEIN, J., concurred in the judgment.

BEATTY, C. J., dissenting. — According to the opinion of the court, the plaintiff's action was barred by section 361 of the Code of Civil Procedure, because, and only because, an action by defendants to foreclose would have been barred by said section. I am not satisfied with the

reasoning by which the conclusion is reached, that the defendants were barred of their action to foreclose before this action was commenced; but conceding it to be correct, it does not follow, in my opinion, that the plaintiff's right of action was thereby lost.

That the right to redeem and the right to foreclose were barred at the same time was undoubtedly the law of this state prior to the codes; but since they were enacted, the right to redeem is unaffected by the extinguishment of the right to foreclose. (Code Civ. Proc., sec. 346; Civ. Code, sec. 2903; *Raynor v. Drew*, 72 Cal. 310; *Booth v. Hoskins*, 75 Cal. 271; *De Cazara v. Orena*, 80 Cal. 134; *Hall v. Arnot*, 80 Cal. 354; *Warder v. Enslen*, 73 Cal. 291.) In other words, the codes have prescribed another rule for the limitation of actions to redeem from mortgages and other liens. By the old rule, the right to redeem was barred when the right to foreclose was barred; and whether this resulted from the fact that each was covered by the same clause of the statute, or from the equitable doctrine of mutuality of rights and remedies under such contracts, the rule itself had no other effect than to fix a period of limitation to the right to redeem. This rule has been changed, and the period of limitation enlarged by a law passed since the making of the contract here involved, but before the right of action of either of the parties had been lost, and before the commencement of this suit. The question therefore is, which rule applies, — the old or the new.

That these provisions of the codes were intended to apply to all actions commenced after they took effect is to my mind perfectly clear. It is true, the codes are not retroactive (Civ. Code, sec. 3; Code Civ. Proc., sec. 3), and it is also true that vested rights should never be impaired by giving a retroactive effect to a law. But a law enlarging the period of limitations upon existing contracts is not a retroactive law, and it impairs no vested rights. Unless restricted in its operation by its own terms, a new rule of limitations necessarily applies to all actions thereafter commenced, and to all causes of

action not already extinguished by the running of time under the pre-existing rule. This being so, we have only to look to the express provisions of the codes to see how far the new rules by them prescribed are restricted in their operation upon actions commenced after they took effect.

In section 6 of the Civil Code we find the following provision: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions." Section 8 of the Code of Civil Procedure contains the same language. The clear implication is, that actions not commenced and rights not vested prior to the adoption of the codes are to be controlled by their provisions.

The more specific provision respecting the application of the new rules of limitation is found in section 362 of the Code of Civil Procedure, and is as follows: "This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of that section." Here the implication is equally clear that the new rules apply to all actions not already commenced, and to all cases where the time prescribed by existing statutes for barring the remedy has not fully run. In this case the time had not run, and the action had not been commenced. The conclusion, therefore, cannot be avoided, that the rule of the code applies unless its application would have the effect of changing the contract or impairing its obligation.

The respondents contend and the court holds that such would be its effect. They say that the law of the state of California, as it existed at the date of their deed from John H. Allen, defining the mutual rights and obligations of the parties to the transaction, entered into and became a part of the contract, and that such law gave them, the respondents, an important right which the above-cited provisions of the codes would take away

or materially abridge. If this is true, it must be conceded that the code provisions are inapplicable. But is it true? What are the rights conferred by the law of 1869 which the codes take away or impair? They do not take away or impair the right of a mortgagee to foreclose; they merely enlarge the time within which the mortgagor may redeem, and this is all the respondents have to complain of. By the law of California prior to the codes, they say a mortgage in the form of an absolute conveyance invested the mortgagee with the legal title to the land, leaving in the mortgagor a mere equity of redemption, which was barred and extinguished at the same moment that the debt was barred, thereby creating in the mortgagee a title complete, absolute, and indefeasible, without the necessity of a foreclosure; and therefore, they insist it must be held that this right to obtain a complete title without foreclosure was among the advantages they bargained and paid for, and is a right of which they could not be deprived by subsequent legislation, as they would be if subjected to the code provisions (Code Civ. Proc., sec. 346; Civ. Code, sec. 2903), under the operation of which they could never perfect their title except by foreclosure, or by five years' adverse possession of the mortgaged premises after condition broken.

The completeness of this argument is marred by the fact that it assumes too much for the law of California before the codes. The decisions relied on by respondents do not go to the extent claimed for them. The cases cited are *Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Cal. 58; *Pico v. Gallardo*, 52 Cal. 206, etc. A critical examination of this line of decisions will show that the only case in which a mortgagee by deed absolute could acquire an indefeasible title to the mortgaged estate without foreclosure was when he had possession. This was the case in *Espinosa v. Gregory*, 40 Cal. 58. The mortgagee was in possession, the right to foreclose was barred, and it was held that the mortgagor had thereby lost the right to redeem. The mortgagee got the land without foreclosure. But in *Hughes v. Davis*,

40 Cal. 117, and *Pico v. Gallardo*, 52 Cal. 206, the mortgagors were in possession, and the mortgagees were suing in ejectment after their right to foreclose was barred. It was held that the mortgagees had the legal title to the lands, and that they were entitled to recover possession *in the absence of allegations in the answers setting forth the equities of the defendants, with an offer to pay the amount of the mortgage liens, and prayer that the conveyances be declared mortgages.* In other words, a right of redemption on the usual terms, against the mortgagee out of possession, was distinctly admitted, although the right to foreclose was barred.

Now, what right of these respondents, under the law as declared in the cases referred to, would be taken away or impaired by sustaining plaintiff's action to redeem? They never had possession of the mortgaged premises, and had no right to the possession. If, after their right to foreclose was barred,—if it ever was barred,—they had anticipated the plaintiff in taking possession of the land, their title might thereby have become perfect, under the doctrine of *Espinosa v. Gregory*, 40 Cal. 58, but if plaintiff had anticipated them in taking possession, their only remedy would have been to sue in ejectment, in which case he could have set up his equity and effected a redemption according to the doctrine of *Pico v. Gallardo*, 51 Cal. 206, upon precisely the same terms that can be imposed in this action. The only difference between this case and the case supposed is that plaintiff, without taking possession and without waiting to be sued, offers the respondents in advance all that he would be compelled to pay in order to redeem if he had taken possession and waited for them to sue. To allow this would surely not be to deprive the respondents of any valuable right.

Enough has been said, I think, to show that respondents never brought themselves within the rule of *Espinosa v. Gregory*, 40 Cal. 58, because they never had possession of the land; but if the fact had been otherwise, all the decisions of this court are to the effect that a law

extending plaintiff's right of redemption would be valid. Take the case of tax sales. Prior to March, 1885, the purchaser of land sold for delinquent taxes became at once entitled to a tax deed if the property was not redeemed before the expiration of the year. In March, 1885, the law was so amended as to require the purchaser to give thirty days' notice to the owner or occupant of the land of his intention to apply for a deed. This amendment to the law was held to apply to sales made before its adoption. (*Oullahan v. Sweeney*, 79 Cal. 539.) It is impossible to distinguish that case from this; and if it was correctly decided, there can be no doubt of the power of the legislature to extend the right of a mortgagor to redeem. (See also *Moore v. Martin*, 38 Cal. 438; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.)

In the briefs of counsel a large number of decisions are cited from the reports of other states, bearing more or less directly upon this point, with respect to which it can only be said that they are so conflicting as to furnish no ground for reversing our own decision in *Oullahan v. Sweeney*, 79 Cal. 539.

A decision on this point by the supreme court of the United States would of course be binding authority, as the immunity asserted arises under the constitution of the United States; but no such decision has been cited. What was said by Judge Taney in *Bronson v. Kinsey*, 1 How. 316, has been pronounced *obiter*, and its authority denied by this court. (See dissenting opinion of Judge Heydenfeldt in *Thorne v. San Francisco*, 4 Cal. 156, adopted in *Moore v. Martin*, 38 Cal. 438.) Of the cases cited in the Department opinion heretofore filed, that of *Phinney v. Phinney*, 81 Me. 450, 10 Am. St. Rep. 266, comes nearer than any other to sustaining the contention of respondents; but even that might be distinguished, for the law there held unconstitutional was one by which the equity of redemption could be *indefinitely extended at the suit of a stranger to the mortgage*.

Finally, it may be said that if the doctrine under discussion is to control the decision of this case, it may be

invoked by the appellant with quite as much justice as by respondents. The case of *Hughes v. Davis*, 40 Cal. 117, and *Espinosa v. Gregory*, 40 Cal. 58, were not decided until the year following the deed of John H. Allen, and they directly overruled a long line of decisions by this court, holding that a mortgage by deed absolute did not pass the legal title. The construction given to our laws by these decisions was the law itself at the date of that deed, and fixed the rights of the parties so that they could not be changed by a subsequent construction any more than by subsequent legislation. (*Douglas v. Pike Co.*, 101 U. S. 687; *Gelpcke v. Dubuque*, 1 Wall. 175.)

For these reasons, I conclude that the finding of the superior court that plaintiff's cause of action was barred by section 361 of the Code of Civil Procedure is not sustained by the evidence, and therefore, that a new trial should have been granted, and that the order appealed from and the judgment should be reversed, and the cause remanded for a new trial.

[No. 13637. In Bank. — June 18, 1892.]

J. W. REAY, APPELLANT, v. JOHN BUTLER ET AL.,
RESPONDENTS.

APPEAL — REVIEW OF CONFLICTING EVIDENCE — DEPOSITIONS — ORAL EXAMINATION OF WITNESS. — The fact that upon the second trial of a cause a large part of the testimony taken at the first trial was read without recalling the witness, and two or three depositions were introduced, does not warrant the appellate court in drawing its own conclusions from conflicting evidence, and disregarding the conclusions reached by the trial judge, where two or three witnesses, including the plaintiff himself, whose former testimony was read, were re-examined, and many others were examined whose testimony was to a large extent important and material.

Id. — REASONS OF RULE AS TO REVIEW OF EVIDENCE — APPELLATE JURISDICTION. — The rule that this court will not review the finding of a jury or of a court as to a fact decided upon the weight of evidence is not adopted merely because the court below has the opportunity to observe the appearance and bearing of the witnesses, but is founded in the essential distinction between the trial and appellate courts under our

system, and grows out of consideration of jurisdiction, that it is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law, and that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show an abuse of discretion.

ID. — REVIEW OF WRITTEN EVIDENCE — CONFLICTING EVIDENCE. — The appellate court will look more closely into the evidence when it consists entirely of depositions, affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply.

POSSESSION OF LAND — INCLOSURE OF EXTERIOR BOUNDARIES OF TWO TRACTS HELD IN SEVERALTY — TRESPASS — CONTEST OF POSSESSORY RIGHTS. — If two owners in severalty of adjoining tracts of land by mutual consent inclose the two tracts together by a fence around the exterior boundaries of both, the inclosure thus made constitutes possession as against any third party who is a mere intruder; and it is immaterial whether the lands are public or private, where the contest is merely one of alleged possessory rights between the parties to the action.

ID. — EJECTMENT — RECOVERY MUST BE UPON STRENGTH OF PLAINTIFF'S TITLE. — In an action of ejectment, the plaintiff must rely upon the strength of his own title, no matter how weak the title of his opponent may be.

ID. — INSUFFICIENT ACTS OF POSSESSION — ATTEMPTS TO BUILD SHANTIES — DESTRUCTION BY ADVERSE CLAIMANT. — The acts of the plaintiff in employing two men to build a small wooden shanty on the land claimed by him, who worked upon it two days, when the adverse claimant tore it down, and drove the men away, and in returning a few days afterward, and again attempting to build a wooden shanty, when he was again driven off, and the shanty torn down, do not constitute even a scrambling possession of the land beyond the spot on which the shanties were commenced to be built; and such a possession will not support an action of ejectment for the tract on which the shanties were sought to be erected.

ID. — CONSTRUCTIVE POSSESSION — DEED NOT TAKEN IN GOOD FAITH — COLOR OF TITLE. — A party who takes a deed to land not in good faith, believing that the grantor has any title to the land, but for the express purpose of asserting color of title, cannot invoke the doctrine that one entering upon land under color of title given by a deed has constructive possession to the extent of its boundaries.

ID. — EVIDENCE — DECLARATIONS OF DEFENDANT'S GRANTOR — ABANDONMENT — GENERAL CONVERSATIONS — LEADING QUESTIONS — RULING NOT PREJUDICIAL. — During the examination of a witness for the plaintiff in ejectment as to the declarations of one of the parties through whom the defendant claimed title, as to the abandonment of his claim to the land, it is not error to sustain an objection of the defendant to general conversations relating to the land, and to a leading question asked as to whether he said he would not return to the land, and when the witness, in answer to the question as to whether he said anything about the land, and what he said, without objection told what he did say, the ruling could not be prejudicial.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

J. B. Mhoon, and *W. W. Foote*, for Appellant.

The rule that this court will not disturb a finding when there is a conflict of testimony does not apply, when the evidence is presented by depositions or notes of a former trial. In such a case, this court will examine the testimony upon the issues involved. (*Lander v. Beers*, 48 Cal. 547; *Wilson v. Cross*, 33 Cal. 69.) As the land in question was part of the pueblo land of the city, the enclosure of the tract by a fence around the whole tract, and its being held by "joint and common possession," was insufficient to constitute an actual possession which the ordinance contemplates. (*Wolf v. Baldwin*, 19 Cal. 306; *Elliott v. Pearl*, 10 Pet. 441; *Plume v. Seward*, 4 Cal. 95; 60 Am. Dec. 599; *Davis v. Perley*, 30 Cal. 638; *Polack v. McGrath*, 32 Cal. 18; *Brumagim v. Bradshaw*, 30 Cal. 44; *Lawrence v. Fulton*, 19 Cal. 690; *Le Roy v. Cunningham*, 44 Cal. 600; *Wolfskill v. Malajovich*, 39 Cal. 276; *Steinberger v. Andrews*, 4 Nev. 59.) It was error for the trial court to sustain the objections of defendant to the conversations relating to the land, and as to whether the witness abandoned the land. Abandonment is a question of intention, and may be inferred from acts and circumstances, though the person abandoning may declare he does not abandon. (*Myers v. Spooner*, 55 Cal. 257.) Upon a question of abandonment, as upon a question of fraud, a wide range should be allowed, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any facts or circumstances from which any aid for the solution of the question can be derived. (*Bell v. Bed Rock Co.*, 36 Cal. 218; *Wilson v. Cleaveland*, 30 Cal. 192.) If possession is a fact, then Reay certainly had it by actual occupation, when Tread-

well tore down his house, and drove his tenant, Miller, away. If it is a conclusion of law, then we ask who had possession during the month that Miller, Reay's tenant, was confessedly on the place, in the house that Treadwell built. A tenant cannot, by attorning to a third party, affect his original landlord's possession. (Sedgwick and Wait on Trial of Title, sec. 354; Taylor on Landlord and Tenant, sec. 180; Stats. 1855, p. 171; Civ. Code, sec. 1948; *Thompson v. Felton*, 54 Cal. 547; *Thompson v. Pioche*, 44 Cal. 508; *Doe v. Reynolds*, 27 Ala. 376; 1 Washburn on Real Property, *363.) The deed from Owens to Reay, although it might have been inoperative as a conveyance, showed color of title. (*Packard v. Moss*, 68 Cal. 127; *Minot v. Brooks*, 16 N. H. 374.) The question as to what is "color of title" is a question of law. (Wood on Limitations, 531.) Whether it be admitted or not that Owens's deed was ever executed and delivered, clearly the lease to Miller is a fact, and all the time Miller held and attorned to Treadwell, he, in law, is deemed to have been in possession of the premises under this lease. Such a lease is also color of title, and defines the extent of the tenant's possession. (*Murphy v. Snyder*, 67 Cal. 452; *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814.) Reay believed he had a right to go upon this tract, and that is evidence of his good faith. (*McCracken v. City of San Francisco*, 16 Cal. 636; Sedgwick and Wait on Trial of Title, sec. 775.) But where is the evidence of Reay's bad faith, or want of good, upon which this finding is supposed to be based? It cannot be presumed. On the contrary, *bona fides* will be presumed until the contrary appears. (*Brooks v. Bruyn*, 35 Ill. 394; *McMullin v. Erwin*, 58 Ga. 427.) Speck claimed no interest in Killian's tract of land, and Killian claimed none in Speck's; yet Killian was in as much possession of the land in suit as was Speck; the exclusive possession required was destroyed. (*Brumagim v. Bradshaw*, 39 Cal. 24.) Speck's inclosure without exclusive possession is not sufficient. (*Polack v. McGrath*, 32 Cal. 15.) Although there might be a case of tenancy in common of

a naked possession of public land, if all the co-tenants actually occupied the land (*Lillianskyoldt v. Goss*, 2 Utah, 292), still, as Speck left the tract of land in question here, the co-tenancy in the naked possession ended. Such possession must be exclusive. (Sedgwick and Wait on Trial of Title, 752, citing authorities.) Speck's and Treadwell's joint possession or occupation with Killian, as referring to private land, would have doubtless been good as against a third person, even the owner, because it was presumptively adverse to him. But such occupation or possession is not effective in the case of public land, for the reason that by the statutes, this possession must be actual or by tenant, in order to ripen into a title against the public. It must also be visible to all, exclusive of all, and hostile to all; and the possession of private land must be visible to, hostile to, and exclusive of the true owner, before it can ripen into a title. (Wood on Limitations, sec. 257; Washburn on Real Property, 489; *Sparrow v. Hovey*, 44 Mich. 63.)

S. M. Wilson, and *W. S. Goodfellow*, for Respondent.

There was a great conflict of evidence on some of the important points in the case, and there is no reason why the general rule should not be applied, that this court will not disturb the findings upon a question of fact where the evidence is conflicting. (*Escolle v. Merle*, 9 Cal. 95; *Pfeiffer v. Riehn*, 13 Cal. 643; *Burnett v. Whitesides*, 15 Cal. 36; *Baxter v. McKinley*, 16 Cal. 77; *Noonan v. Hood*, 49 Cal. 294; *Trenor v. C. O. R. R. Co.*, 50 Cal. 222.) Speck never abandoned the property until he sold the property. Abandonment consists in leaving the premises vacant, without the intention of reclaiming the possession, or appropriating it in any manner to the use of the possessor subsequently, and with a view to leave it open to the occupation of any one who may choose to enter. (*Smith v. Cushing*, 41 Cal. 97; *Judson v. Malloy*, 40 Cal. 299.) The intention to abandon is not necessarily to be inferred from the fact that the premises have been left vacant, unimproved,

and without attention for more than five years before the commencement of an action, but such a fact may be taken into consideration in deciding the question of abandonment. (*Judson v. Malloy*, 40 Cal. 299; *Moon v. Rollins*, 36 Cal. 333.) The fact that a person when ceasing to occupy premises leaves a person in charge is of itself sufficient to rebut the presumption of abandonment arising from a cessation of occupancy. The question of abandonment is one of intention, proper for determination by a jury under the circumstances, or by the court, a jury being waived. (*Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738; *Roberts v. Unger*, 30 Cal. 676.) The defendants were not in the possession of the land when the action was commenced. It was essential for the plaintiff to allege and prove the possession of the defendants at the time of the commencement of the action. (*Owen v. Morton*, 24 Cal. 373; *Pope v. Dalton*, 81 Cal. 218; *Buhne v. Corbett*, 43 Cal. 264; *Brown v. Brackett*, 45 Cal. 167; *Mahoney v. Middleton*, 41 Cal. 41; *Miller v. Chandler*, 59 Cal. 540; *Schaeffer v. Matzen*, 59 Cal. 652; *Soto v. Irvine*, 60 Cal. 436; *Dillon v. Center*, 68 Cal. 561.) The rule as to color of title laid down in *Walsh v. Hill*, 38 Cal. 481, is the settled law of this state. (*Wilson v. Atkinson*, 77 Cal. 485; 491-493; 11 Am. St. Rep. 299; *Webber v. Clarke*, 74 Cal. 16.) The Van Ness ordinance is referred to, and it is argued that Treadwell's possession was not such as is required by that ordinance. But there may be possession sufficient for a defense, or even for a recovery in ejectment, although not sufficient to entitle the holder to the benefits of the Van Ness ordinance. (*Polack v. McGrath*, 32 Cal. 15.)

McFARLAND, J.—This is an action of ejectment, and was commenced by plaintiff on February 20, 1866, in the former district court of the fifteenth judicial district, against John Butler and P. H. Owens, who were the only persons named as defendants. In the complaint it is averred that on the first day of January, 1863,

plaintiff was "seised and possessed" of certain described land, situate in the city and county of San Francisco; and that on the first day of January, 1863, the defendants (Butler and Owens) wrongfully entered upon said land, "and ousted and ejected plaintiff therefrom, and ever since have held and now hold possession thereof from plaintiff."

There was a former appeal in this case, reported in 69 Cal. 573; and from the opinion of this court, then delivered, it appears that Butler and Owens answered, denying all the averments of the complaint, averring that J. P. Treadwell was "the owner and in possession" of the land sued for; that they (Butler and Owens) were there only by license of Treadwell, and praying that the latter be allowed to defend the action, and that they be dismissed; and that by leave of court Treadwell filed an intervention in which he set up matters upon which he claimed certain equitable relief. It appears further, that the district court, after having impaneled a jury to try the cause, and after the trial had commenced, concluded to try what were supposed to be the equitable issues first, and against the objections and exceptions of plaintiff, discharged the jury, and after a hearing of said equitable issues, rendered judgment perpetually enjoining plaintiff from further prosecution of his action. But on the appeal from that judgment this court held that there were no equitable issues, and that plaintiff was entitled to a jury trial, and reversed the judgment, with directions to strike out the intervention, and that the representative of the intervener (said Treadwell in the mean time having died) be allowed to defend the action.

When the case went down to the superior court, new answers were filed for Owens and Butler; and Mrs. Mabel Treadwell, who was then administratrix of said J. P. Treadwell, filed an answer, by leave of court, in her own name. In her answer she denied all the averments of the complaint; and she averred that at the commencement of the action, and for more than five years prior

thereto, said J. P. Treadwell, by himself and his grantors and predecessors, was and had been the owner and in possession of all that part of the land sued for which was known as the "Speck ranch," and was in possession of the same continuously until his death, which occurred in December, 1884; that since his death she, as administratrix, has been in possession thereof, and the estate of said Treadwell, deceased, and his heirs and devisees, are the owners and entitled to the possession thereof; and that at the time of the commencement of the action the defendants Owens and Butler were not in possession of any of the land described in the complaint, but were, to plaintiff's knowledge, the mere servants and employees of said J. P. Treadwell. Both parties waived a jury; and the court, after a second hearing of the case, made its findings of fact, and found, as a conclusion of law, "that defendants are entitled to judgment in this action." Whereupon judgment was entered that "plaintiff take nothing by this action," and that defendants be dismissed and recover costs of plaintiff. Plaintiff made a motion for a new trial, which was denied, and he appeals from the judgment, and from the order denying his said motion.

There is only one assignment of error occurring during the trial, which will be noticed hereafter. The main contentions of appellant are, that the evidence is insufficient to justify the findings of fact, and that the decision is against law. It is clear, however, that if the findings are justified by the evidence, then the conclusion of law and the judgment are correct; so that the real question in the case is, Does the evidence justify the findings?

At the trial, by consent of the parties, a large part of the testimony taken at the first trial was read without recalling the witnesses, and two or three depositions were introduced; and appellant contends that when a case has been decided by the lower court upon this kind of evidence, the rule that this court will not disturb a finding when there is a conflict of evidence does not apply, and that this court should sit practically as a

nisi prius court, and draw its own conclusions from the evidence, regardless of the conclusions arrived at by the jury or the judge in the trial court. While, for the reasons hereafter stated, the determination of this point is not absolutely essential to the decision of this appeal, it may be well for the benefit of future litigants to intimate that the doctrine contended for has not, thus far at least, become the settled law of this state. It has been held here in more than a hundred cases, commencing with *Payne v. Jacobs*, 1 Cal. 39, in the first published books of reports of this court, and ending with *Dobinson v. McDonald*, 92 Cal. 33, in the last volume of such reports, that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court; and so the general rule is clearly established. It was said, however, in the opinion of the court in two or three cases, notably in *Wilson v. Cross*, 33 Cal. 60, that the reason of the rule is, that the court below has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain when the witnesses do not appear personally in court. But it may be well argued that such is not the only reason of the rule; that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. Indeed, there are numerous cases in which the decisions of this court have been directly contrary to the doctrine contended for by appellant. For instance, it has been held directly in several cases that the rule as to conflicting evidence applies to a case where the trial was before one judge, and the motion for a new trial passed upon by his successor, and where the latter saw none of the witnesses; or where the trial was before the old district court, and the motion

before the succeeding superior court. (*Bauder v. Tyrrel*, 59 Cal. 99; *Altschul v. Doyle*, 48 Cal. 535; *Macy v. Davila*, 48 Cal. 647.) The same rule has been applied on appeal from an order dissolving an injunction, where all the evidence in the lower court was upon affidavits. (*Parrott v. Floyd*, 54 Cal. 535.) In *Bauder v. Tyrrel*, 59 Cal. 99, the court says: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only." The appellate court will, no doubt, look a little more closely into the evidence when it consists entirely of depositions or affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply.

But even if the rule were as appellant contends, it would not apply to the case at bar; for in this case two or three witnesses, including the plaintiff himself, whose former testimony was read, were re-examined at the last trial, and about fifteen new witnesses were examined, whose testimony was to a large extent important and material; and under these circumstances, it is quite clear that the general rule as to conflicting evidence applies. (*Blum v. Sunol*, 63 Cal. 341.)

The appellant's objections to the findings as not supported by the evidence refer mainly to those findings which set forth the possessory right of the said J. P. Treadwell to the land in controversy at the time of the alleged ouster. The findings as to such right are, in brief, as follows: In the year 1853 one Alexander Speck entered upon a tract of land containing about forty-one acres, and known afterwards as the "Speck ranch," being part of the premises described in the complaint. It was then part of the unoccupied pueblo lands of San Francisco. In that year (1853) he built a house on the land, and lived there during part of that year, and during the next year, and down to October, 1855. He made charcoal at various times from wood on the land, and had a garden on it, and raised vegetables. A man named Killian claimed a piece of land containing about thirty-nine acres, which adjoined the Speck ranch on the

north; and in 1853, Speck and Killian jointly built substantial brush fences around the exterior boundaries of the two tracts, which fences, together with some fencing which had been built by other adjoining claimants, inclosed the two tracts with fences sufficient to turn cattle; and these fences were at all times, down to the commencement of the action, sufficient to turn cattle. There was no fence along the boundary line between the land claimed by Speck and that claimed by Killian, but each recognized the claim of the other, and the fences were built jointly for the purpose of protecting each in the possession of what he claimed. In October, 1855, Speck went to the mines, but did not abandon the Speck ranch. He left it in the possession and keeping of one Robert Sheridan, as tenant of himself and Killian. Sheridan lived with his family in the Speck house, manufactured charcoal out of wood on the land, kept the exterior fences around both tracts in good condition, and held possession until the spring of 1859. After Sheridan left, Killian took charge and possession of the two claims for himself and Speck, and early in 1860 placed one Markgraf in possession as the employee of both. Markgraf repaired the fences, and built some new fencing. He resided on the Killian claim within the common inclosure until Christmas, 1861. He also built a new house on the Killian claim, and Killian resided in said new house from some time in 1861 to the end of 1862. In February, 1861, Speck executed to one Marye a power of attorney (recorded March 6, 1861) to sell and convey the Speck ranch on his (Speck's) behalf, and on March 1, 1861, Marye sold and conveyed the same to one Austin E. Smith, — deed recorded March 6, 1861. Through conveyances from Smith and his grantee, all right and title of said Speck to said Speck ranch vested in said J. P. Treadwell on April 28, 1862. Treadwell was a *bona fide* purchaser, and entered into possession without notice of any other claim to the land except that of the city and county of San Francisco. The defendants Owens and Butler never had any possession of

the land in contest, but at the time of the commencement of the action were the mere employees of Treadwell, and occupied in building a house for the latter.

The foregoing are the main facts found with respect to the possessory right of Treadwell; but there are many details in the findings not necessary to be recited here. There was conflicting evidence as to some of the facts found, particularly as to whether the fences around the two tracts were kept up in good condition; whether Speck's house was below or above the line between his land and that of Killian; whether Speck abandoned his claim when he went to the mines; whether Sheridan and Markgraf were in possession under Speck; whether Killian always recognized the right of Speck, and was in possession for both himself and Speck, etc. But upon an examination of the evidence, we find that it sufficiently supports the findings of the facts upon which Treadwell's possessory rights are based, and we perceive no abuse of discretion committed by the lower court in making such findings. It is contended by appellant that the common inclosure of the two tracts by an exterior fence around both did not constitute possession by either claimant, — there being no tenancy in common between them. But if two owners in severalty of adjoining tracts of land, by mutual consent, inclose the two tracts together by a fence around the exterior boundaries of both, it seems clear enough that the inclosure thus made constitutes possession as against any third party who is a mere intruder. It is contended, also, that even if this rule were good as to private lands, it cannot be applied to the possession of public lands; but we fail to see the distinction, so far, at least, as to affect the case at bar. Here there is no question as to what kind of possession, or what acts, would give to the occupant of public land the right to acquire the title in fee from the public proprietor. The case merely presents a contest of alleged possessory rights between the parties to the action, and the title of the real proprietary owner cuts no figure.

2. But really the court below and counsel have attached more than its just importance to the right acquired by J. P. Treadwell from Speck. This is an action of ejectment, in which plaintiff must rely upon the strength of his own title, no matter how weak the title of his opponent may be. And when we come to examine the right of plaintiff to recover, we find that it has no foundation. The court finds that "the plaintiff herein never had, nor did any ancestor, predecessor, or grantor of plaintiff ever have, any possession of the lands, or any part of the lands described in the complaint"; and this finding is amply supported by the evidence, whether we look at it with the eyes of an appellate or *nisi prius* court. The only *facts* upon which his alleged possessory claim rests are these: During the first half of October, 1862, plaintiff employed two men to build a small wooden shanty on the land; but after they had worked about two days, and before the shanty was finished, Treadwell heard of it, and went upon the land, tore down the shanty, and drove the men away. A few days afterwards plaintiff again went upon the land, and attempted to build a wooden shanty, when the same thing again happened, that is, Treadwell tore down the shanty before it was completed, and drove away the man, who, together with two bull-dogs, was sleeping in it without bed or bedding. No further act was done by plaintiff in the premises; but between three and four years afterwards he commenced this action of ejectment; and we think it so clear that these acts do not constitute such a possession as will support ejectment that an elaboration of the point would be useless. He did not have even a "scrambling" possession of any land except the spot on which the shanties were commenced to be built; and that spot cannot now be definitely located. Appellant claims that when he commenced to build the shanty he had a deed from P. H. Owens, which purported to convey the premises described in the complaint; and he invokes the doctrine that one entering upon land under color of title given by a deed has constructive possession to the

limits of the boundaries described in the conveyance. But in the first place, the court found that he never had such a deed. The evidence on the point was this: Appellant testified that he once had such a deed, and had lost it; and Owens testified positively that he had never executed any such deed; and, under such circumstances, we certainly could not hold the finding unwarranted by the evidence. And in the second place, it plainly appears from the evidence that if appellant ever had such deed, he did not take it in good faith, believing that Owens had any title (and he did not have any), but for the express purpose of asserting color of title. And as this court said in *Wilson v. Atkinson*, 77 Cal. 492; 11 Am. St. Rep. 299: "It could not be justly said that a party was founding his claim upon a written instrument, as being a conveyance, when he knew the instrument to be absolutely void. The code should be construed as requiring the claim to be made in good faith, believing the deed to be a conveyance of the property." (What effect such a deed would have upon the rights of a party who had held possession for five years, and pleaded the statute of limitations, does not here arise.)

It is contended that the court erred in ruling upon the admissibility of evidence during the examination of the witness Mrs. Ann Cook. The alleged error, if it existed, would not be important enough to affect the determination of the case; but there was no error. The appellant was trying to get from the witness declarations of Speck, tending to show his abandonment of his claim to the land; and the record merely shows that the court sustained an objection to general conversations not relating to the land. Appellant then asked the witness, "Did he say in that conversation that he would not return to this land?" and an objection that it was leading was sustained. The question was then asked, "Did he say anything about this land? if so, what?" and the witness, without any objection, went on to tell what he did say. In all this we see no error, — certainly no prejudicial error.

In his assignments of error, and in his briefs, appellant has stated his positions under many subdivisions and heads of discussion; but we think that we have referred to all matters necessary to be noticed. We see no good reason for disturbing the judgment.

Judgment and order denying a new trial affirmed.

GAROUTTE, J., SHARPSTEIN, J., and PATERSON, J., concurred.

DE HAVEN, J., concurred in the judgment upon the second ground discussed in the foregoing opinion.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

[No. 12623. In Bank. — June 18, 1892.]

SPRING VALLEY WATER WORKS, RESPONDENT, v. MARY DRINKHOUSE, APPELLANT.

EMINENT DOMAIN — POSSESSION PENDING LITIGATION — REVERSAL OF JUDGMENT — CONSTITUTIONAL LAW. — Section 1254 of the Code of Civil Procedure, in regard to proceedings for the condemnation of property for public use, allowing an adequate fund to be paid into court, whereupon the court 'may authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation,' etc., is not in conflict with the constitution, but the allowance of the continuance of possession after the reversal of a judgment upon appeal "until the final conclusion of the litigation" is within the power of the legislature.

ID. — RESTITUTION OF POSSESSION — DISCRETION OF APPELLATE COURT — CONSTRUCTION OF CODE. — Section 957 of the Code of Civil Procedure, which provides that the appellate court may make complete restitution of all property and rights lost by an erroneous judgment or order which is reversed or modified, is not mandatory upon the court, and does not give appellant an absolute right to a restitution of possession, but the power conferred thereby is to be exercised in the discretion of the court.

ID. — CONDEMNATION OF LANDS FOR RESERVOIR — NECESSITY OF TAKING FINALLY DETERMINED — REVERSAL ON QUESTION OF VALUE. — In proceedings to condemn lands for a reservoir, which is to be used to supply San Francisco and its inhabitants with water, where it has been finally determined in the action that the use to which the plaintiff

proposes to put the land is authorized by law, and that its taking by the plaintiff is necessary to such use, and a judgment for the plaintiff is reversed for the sole purpose of determining upon a new trial the amount of compensation and damage to be awarded to the defendant, and it appears that plaintiff has been allowed to take possession until the final conclusion of the litigation, under section 1254 of the Code of Civil Procedure, and it is contended that the amount deposited under that section is not adequate to satisfy any judgment that may be recovered at any future trial, there is nothing to demand the exercise of the discretionary power vested in the appellate court to compel restitution of possession upon such reversal.

Motion in the supreme court for a writ of restitution.
The facts are stated in the opinion of the court.

Ben Morgan, for Appellant.

Fox, Kellogg & King, and *William F. Herrin*, for Respondent.

GAROUTTE, J.—After judgment was entered in the trial court, July 27, 1887, in favor of the plaintiff, for the condemnation of 14.45 acres of defendant's land to public use as part of a reservoir site (compensation and damages to defendant being assessed at \$5,103 and \$100 costs), and pending defendant's appeal therefrom, the court below, upon due application therefor by plaintiff, entered an order October 8, 1887, under section 1254 of the Code of Civil Procedure, authorizing the plaintiff, upon paying into court \$5,000 in addition to the amount of the judgment, to take possession of and use the property condemned "during the pendency of and until the final conclusion of the litigation," and staying all actions and proceedings against the plaintiff on account of such possession and use.

In pursuance of this order, after paying into court the sums above required, plaintiff took possession of the land in controversy, and has since used the same as part of the lower Crystal Springs reservoir site, the lower part of the land being now covered with water thirty feet in depth, there being held in this reservoir above the lowest level of the land in question 3,682,546,000 gallons of water. The water in this reservoir is used to supply San

Francisco and its inhabitants with water, and is necessary to maintain an adequate supply therefor.

Upon defendant's appeal from the judgment, and from an order refusing a new trial, this court, on December 29, 1891 (92 Cal. 535), entered the following order: "Judgment and order reversed, with directions to the court below to retry the issues as to the value of the land sought to be taken, and the damage to the remaining portion of the land not taken; and thereupon to enter judgment in accordance with the prayer of the complaint, and in favor of the defendant for such value and damages, and costs."

It has therefore been finally determined in this action that the use to which plaintiff proposes to put the defendant's land is a use authorized by law, and that its taking by plaintiff is necessary to such use, and all that remains to be determined upon a new trial is the amount of compensation and damages to be awarded to the defendant.

Appellant now petitions this court for a writ of restitution, under section 957 of the Code of Civil Procedure, which section provides that "when the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent," etc. It is insisted that the reversal of the judgment gives appellant the absolute right to a restitution of the premises, but the wording of the statute will bear no such construction. The section is not mandatory upon the court, but the power conferred thereby is to be exercised when the circumstances of the case call for the use of a judicial discretion.

In a case with conditions similar to the one under investigation, where the judgment has been reversed, and the cause remanded for the sole purpose of determining the amount of compensation to which appellant is entitled, and where it is not contended that the amount deposited with the trial court is not amply sufficient to satisfy any judgment for damages which may be recov-

ered at a future trial of the action in the court below, taken in connection with the additional facts heretofore recited, we see nothing to demand the exercise of that discretionary power vested in the court under section 957 of the Code of Civil Procedure.

This amount of money was deposited with the trial court under the provisions of section 1254 of the Code of Civil Procedure, which allows certain amounts to be paid into court by plaintiff, whereupon the court "may authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation," etc. The final conclusion of this litigation has not yet been reached, and if said section of the code is not in conflict with the constitution of the state, then this proceeding must fail, for the order of the trial court is still in full force and effect. This section is not violative of any provision of the constitution, but directly in line with that instrument wherein it treats of such matters. Section 14, article I., provides: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." It would seem that the framers of both the constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the landowner was first paid into court. This construction of a quite similar provision of the constitution of the state of Missouri was fully adopted in the case of *St. Louis etc. R'y Co. v. Evans and Howard Brick Co.*, 85 Mo. 326. It is conceded that respondent's possession of the premises was lawful down to the time of the reversal of the judgment; the authorities are uniform to that extent. Now, the order of the court, made in the language of the statute, gave respondent possession of the premises "during the pendency of and until the final conclusion of the

litigation"; if the legislature had the power by statute to give the possession of the premises to the respondent pending proceedings upon appeal, under certain conditions and limitations, it had the same power to extend respondent's possession "until the final conclusion of the litigation." The latter clause is no more violative of the constitutional provision than the former. These views are fully supported in *Lake Erie etc. R'y Co. v. Kinsey*, 87 Ind. 514.

Subsequent to the final submission of this motion to the court, facts have been presented upon affidavit, pertaining to matters which have arisen since the date of such submission; these matters are foreign to the merits of the motion under consideration, and cannot be considered upon this application.

Let the application for the writ be denied.

McFARLAND, J., DE HAVEN, J., HARRISON, J., PATERSON, J., and SHARPSTEIN, J., concurred.

[No. 15018. In Bank. — June 29, 1892.]

M. C. THEILMAN, PETITIONER, v. SUPERIOR COURT OF ALAMEDA COUNTY, AND W. E. GREEN, JUDGE, RESPONDENTS.

DIVORCE — DISMISSAL — ATTORNEY AND CLIENT — MANDAMUS — REMEDY AT LAW — SUBSTITUTION OF ATTORNEYS — CONDONATION. — It seems that the attorneys for the plaintiff in a divorce suit are not entitled to insist that the cause be retained until their fees are paid, against the expressed wish of their client to dismiss the action; but *mandamus* to the court is not the proper remedy to compel such dismissal, the plaintiff having an adequate remedy to secure the dismissal, if desired, by a substitution of attorneys; and as the affidavit and prayer for dismissal filed in the action by the plaintiff constitute a condonation by which the defendant can at any time defeat the action, the defendant is not entitled to a writ of mandate to compel the dismissal.

APPLICATION to the Supreme Court for a writ of mandate. The facts are stated in the opinion of the court.

T. C. Van Ness, and L. A. Redman, for Petitioner.

Dodge & Fry, for Respondents.

McFARLAND, J. — This is an original petition in this court for a writ of mandate to compel the respondents to dismiss a certain action pending before them, entitled *Theilman v. Theilman*.

L. D. Theilman, through her attorneys, Dodge & Fry, commenced an action in the court of respondents, against her husband, M. C. Theilman, to obtain a divorce. A demurrer was interposed to the complaint, and overruled. Defendant then filed an answer, and the action is now pending and undetermined. The plaintiff, on March 8, 1882, made an affidavit that she did not desire to further prosecute the action, and prayed the court to dismiss it. Thereupon the defendant, M. C. Theilman (petitioner herein), upon notice to plaintiff's attorneys, moved the court to dismiss the action. At the hearing of the motion plaintiff's attorneys filed a written objection to the dismissal, which was based entirely upon the fact that plaintiff owed them a certain sum of money as attorneys' fee in the case, and in which they consented to the dismissal upon condition that said sum should be paid them. The objection was accompanied by the affidavit of one of plaintiff's said attorneys, showing the amount due them from plaintiff for legal services in the case.

The court denied the motion. In the order denying it the court recites the fact that counsel for defendant were asked if they would pay said attorneys' fee, and declined to do so, and that plaintiff's declined to consent to the dismissal unless their fee was paid, and contended that the action could not be dismissed without their consent while they remained attorneys of record; and the order declared that the motion was denied, "on the ground that Messrs. Dodge & Fry, being attorneys of record for plaintiff, had the absolute right to control the action in her behalf." Thereupon the defendant (petitioner herein) commenced this proceeding to compel the respondents herein to dismiss said action.

It is not necessary to determine whether the respondent erred in refusing to dismiss the action. From the

briefs we learn that the refusal to dismiss was based upon the authority to *San José v. Younger*, 29 Cal. 147; 87 Am. Dec. 164. It may be remarked that the facts in that case were very different from the facts in this case. There it appears that the plaintiffs had authorized the dismissal of the action, "under a misapprehension as to its true condition, and that they would not have done so had they been fully advised." The attorneys for plaintiff in that case refused to consent to the dismissal, in order to protect the interest of their clients. They objected *on behalf* of their clients; and the court held that a client should have the benefit of the judgment and advice of his counsel, and that the control of a case by counsel was a "safeguard to the client against the intrigues of his adversary." But in *Theilman v. Theilman*, it expressly appeared that counsel for plaintiff did not object to the dismissal "on behalf of" their client; they admitted that the dismissal was proper, and objected only on account of their fee, and were willing to consent if their fee was paid. Under these circumstances, it may be considered doubtful if *San José v. Younger*, 29 Cal. 147, 87 Am. Dec. 164, applies, — particularly as the case was for a divorce. However, it is clear, we think, that *mandamus* will not lie. The plaintiff in *Theilman v. Theilman*, if she still wishes to dismiss the action, has an adequate remedy in a substitution of attorneys; and her affidavit and prayer for a dismissal constitute a condonation by which the defendant (petitioner herein) can at any time defeat the action.

The prayer of the petitioner is denied and the proceeding dismissed.

DE HAVEN, J., GAROUTTE, J., and HARRISON, J., concurred.

Rehearing denied

[No. 20911. Department Two. — July 8, 1892.]

THE PEOPLE, RESPONDENT, v. HUGH DEVINE,
APPELLANT.

CRIMINAL LAW — LARCENY — FELONIOUS INTENT — INSUFFICIENCY OF EVIDENCE. — To constitute the offense of larceny, there must be a felonious intent, and where there is an absence of proof of such intent, and the evidence tends to prove that the property taken was honestly believed to be the property of the defendant accused of larceny, the fact that he took and carried away the property of another does not justify a verdict of larceny.

ID. — APPROPRIATION OF LOST PROPERTY FOUND — CONSTRUCTION OF CODE — INSTRUCTION. — Section 485 of the Penal Code, providing that one who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property, without trying to find the owner and restore the property to him, is guilty of larceny, relates in terms to property lost and found, and does not apply to a case where property comes into the possession of a party who does not know or suspect it to be the property of another; and an instruction based on that section, given in such a case, where there is no evidence of the finding of any lost property, is prejudicially erroneous.

ID. — INAPPLICABLE INSTRUCTION — MISLEADING JURY — PREJUDICIAL ERROR. — Although in some cases an inapplicable instruction which is correct as matter of law can do no harm, yet when it is liable to mislead a jury to the prejudice of one of the parties, it becomes as grave an error as though it were not correct as an abstract proposition of law.

ID. — PREJUDICIAL CONDUCT OF DISTRICT ATTORNEY — ALLUSIONS TO OFFENSE NOT IN ISSUE — FELONIOUS INTENT. — Statements, questions, and remarks by the district attorney, in the presence of the jury, in reference to incompetent proposed evidence of previous similar offenses of the defendant, not in issue, for the purpose of leading the jury to believe that the offense charged was committed with felonious intent, the contrary being claimed and testified to on behalf of the defendant, are calculated to prejudice the substantial right of the defendant.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

R. Irwin, J. S. Clark, and Bradley & Farnsworth, for Appellant.

Attorney-General Hart, Deputy Attorney-General Layson, M. E. Power, and D. L. Phillips, for Respondent.

SHARPSTEIN, J. — "Larceny is the felonious stealing,

taking, carrying, leading, or driving away the personal property of another." (Pen. Code, sec. 484.) In this case the evidence is sufficient to justify a jury in finding that appellant took and carried away the property of another; but insufficient to justify the finding that appellant *feloniously stole* the same. Therefore the evidence is insufficient to justify the verdict of guilty of larceny against the defendant, and for that reason he is entitled to a new trial. The evidence shows that the appellant and Robert Doherty occupy adjoining tracts of land, and that each of them keeps upon his own tract a considerable number of hogs. Appellant, wishing to sell some of his hogs, directed two men in his employment to collect his hogs in a pen or inclosure, so that he might select therefrom some denominated "feeders," to take and sell to a butcher by the name of Sam Bee, whose place of business was several miles distant from appellant's farm. Out of forty or fifty hogs in the corral, appellant, with the assistance of his son and the two men who had driven the hogs into the enclosure, selected eleven "feeders," which were loaded on a wagon, and conveyed to Sam Bee's place, and sold to him by appellant. There is evidence tending to prove that three of these eleven "feeders" were marked with Doherty's mark, which differed materially from appellant's mark, but the difference was not noticed by any save one of several witnesses who had equal opportunities with the appellant of observing the difference in the marks. And the witness who testified to having detected the difference does not state that he mentioned the fact to appellant or any one else. Sam Bee, who purchased the hogs from appellant, testified that he did not observe the difference in the marks until his attention was called to it by William Doherty, about a week after the hogs were sold and delivered to him, Bee, by appellant. No part of the transaction was characterized by secrecy, or attempted concealment. Appellant acted throughout as he would be expected to act if he thought he was dealing with his own property, and the evidence tends strongly to prove

that he really and honestly so thought. We think that the evidence, coupled with the presumption of innocence, which attends the accused from first to last, sufficient to overcome the presumption of a guilty intent, arising from a wrongful appropriation of the property of another. He was not informed that any of the hogs he carried away and sold were not his own, and all the evidence tends to prove that he honestly believed they were all his own. There is no evidence to the contrary. The rule applicable to such a case is illustrated by Sir Matthew Hale as follows: "If the sheep of A stray from the flock of A into the flock of B, and B drives them along with his flock, or by pure mistake shears him, this is not felony; but if he know it to be another's, and marks with his mark, this is an evidence of a felony." (1 Hale P. C. 507.)

"Every taking, by one person, of the personal property of another, without his consent, is not larceny; and this, although it was taken without right or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this there must have been a felonious intent, for without it there was no crime." (*McCourt v. People*, 64 N. Y. 583.)

"One person may take or carry away the property of another, of the value of fifty dollars, without being guilty of an offense whatever. But if he does the act feloniously, the statutory crime is committed." (*People v. Cheong Foon Ark*, 61 Cal. 527.)

"It is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another's books." (1 Bishop's Crim. Law, sec 320.)

In a note to *State v. Holmes*, 51 Am. Dec. 260, Mr. Freeman says: "To constitute the offense of larceny, it is absolutely necessary that the taking of the goods be with a felonious intent"; and cites more than a hundred cases in support of that rule.

"We cannot sustain the conviction without confounding the distinction between criminal acts and such as,

however reprehensible, involve only a violation of private rights and injuries, for which there is a remedy only by civil action." (*McCourt v. People*, 64 N. Y. 583.)

We think the verdict in this case was largely, if not wholly, owing to an instruction given to the jury, which, although in the language of section 485 of the Penal Code, was not applicable to this case, and was liable to mislead the jury.

The instruction to which we refer reads as follows: "One who finds lost property, under circumstances which gives him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without making a reasonable and just effort to find the owner and restore the property to him, is guilty of larceny."

Section 485 of the Penal Code, of which this instruction is a copy, "relates in terms to property *lost* (in the apparent possession of no one) and *found*." (*People v. Walenzuela*, 6 P. C. L. J. 561.)

There is no evidence in this case of the finding of any lost property. The property was in the apparent possession of the appellant, who could not have intended to steal it, unless he knew it was not his own property. The objection to that instruction in this case is, that the jury may have construed the instruction to mean that if appellant had the property of another in his possession, and appropriated it to his own use, without making any effort to find the owner, and restore the property to him, he was guilty of larceny, although he may not have known or suspected it to be the property of another. In other words, if, by the exercise of due circumspection, he might have ascertained that some of the hogs in his possession belonged to some one else, he was as guilty as if he had known that they were the property of some one else.

There are cases in which all the knowledge which a person might have acquired by due diligence is to be imputed to him. But where a felonious intent must be

proven, it can be done only by proving what the accused knew. One cannot intend to steal property which he believes to be his own. He may be careless, and omit to make an effort to ascertain that property which he thinks his own belongs to another; but so long as he believes it to be his own, he cannot feloniously steal it. We think if this instruction had not been given, the jury, under the instructions which preceded it, would have returned a different verdict.

In *People v. Buelna*, 81 Cal. 135, one of the defenses was, that the defendant found the property as lost property, and took it up in good faith, to be accounted for to the true owner. In that case section 485 of the Penal Code might properly be given as an instruction to the jury. But in this case there is no such defense or claim set up. The two cases are so clearly distinguishable as to deprive what was said in the earlier case of any weight upon the question we are now considering.

In some cases an inapplicable instruction can do no harm, but when it is liable to mislead a jury, to the prejudice of one of the parties, it becomes as grave an error as though it were not "correct as an abstract proposition of law."

We agree with appellant's counsel, that "the statements, questions, and remarks of the district attorney were peculiarly calculated to prejudice the substantial rights of the defendant." We think what was said by this court in *People v. Lee Chuck*, 78 Cal. 327, and *People v. Bowers*, 79 Cal. 415, peculiarly applicable to the conduct of the district attorney in this case, and we hope the court may not again have occasion to animadvert upon similar conduct of a prosecuting officer.

The record presents no other material errors.

Judgment and order reversed, and cause remanded for a new trial.

McFARLAND, J., concurred.

DE HAVEN, J., concurring.—I am not prepared to say

that the evidence is insufficient to justify the verdict, but I concur in the judgment of reversal because of the error in giving the instruction referred to in the opinion of Mr. Justice Sharpstein, — as to what facts are sufficient to show a larceny of lost property, — and also because of the misconduct of the district attorney in asking the defendant, upon cross-examination, certain questions, and in making a statement in reference thereto in the presence of the jury. The questions were as follows: "You know, as a matter of fact, you had been stealing his hogs right along"; and, "The only reason you have got right now for swearing that you believe that Robert Doherty had an antipathy toward you is because about six years ago he caught you dressing one of his hogs. Isn't that the only reason?" The questions being objected to by the defendant's attorney, they were followed by this statement, made by the district attorney: "I want to show that the only reason that the witness had for believing as he did was because Robert Doherty caught him one time killing one of his hogs. He had testified that Robert Doherty, he believed, had an antipathy against him. We desire to explain why he had that antipathy."

It is not argued here, nor could it be with any degree of seriousness, that these questions were proper, or that the fact offered to be shown was one competent for the jury to consider for any purpose in passing upon the issues involved in the case they were trying. On the contrary, it is apparent that the only object sought by this course of examination, and in the statement made to the court, was to convey to the jury a knowledge of the alleged fact that the defendant was at some prior time guilty of an offense similar to that for which he was then on trial, and that he was at that time caught under such circumstances that he could not interpose the defense of a taking by mistake, — the only defense relied upon in the present case. Such a fact thrown before the jury, and offered to be proven by the testimony of the defendant himself, could not have failed to prejudice the case of defendant. In this case the taking by defendant of

the hogs alleged to have been stolen was not disputed; but the defendant claimed that he had not observed that such hogs bore the mark of the prosecuting witness, and his whole defense depended upon whether the jury should believe his evidence on this point. Under these circumstances, it was very damaging to bring before the jury, in the manner adopted by the district attorney, the fact that upon a previous occasion the defendant had been caught dressing a hog belonging to the same person who was prosecuting him for larceny in this case.

In the case of *Leahy v. State*, 31 Neb. 566, the defendant was on trial for a rape, alleged to have been committed upon one Lizzie Schultz, and upon the cross-examination of the defendant, the prosecuting attorney asked him, among other questions, if he did not go to the residence of one B., on the day succeeding that on which he had made the assault on Miss Schultz, and there meeting Miss B. alone, attempt to kiss her and drag her to a lounge. An objection to the question was sustained, whereupon the prosecuting attorney said, in the presence of the jury: "We intend to follow this matter up, and show that he went right over to B.'s, and there tried to hug and kiss Miss B., and drag her to the lounge." The supreme court held that this was error, and said: "It is the duty of a prosecuting officer to conduct the trial of a criminal case according to established rules. He acts in a semi-judicial capacity, and is supposed to act alone from principle, and without bias or prejudice. The state has guaranteed to every one a fair trial, and such trial cannot be had if the prosecution can resort to tricks to secure a conviction. If such practice was sanctioned, it would result, in many cases, in the conviction of innocent persons. The plaintiff in error was on trial for the crime charged in the information. So far as appears, he had not been charged with any other offense, and certainly was not on trial for the second. The statements of the attorney were improper, and in the highest degree prejudicial, and for those causes the judgment is reversed, and the cause remanded for a new trial." The

case of *People v. Cahoon*, 88 Mich. 456, and that of *People v. Ah Len*, 92 Cal 282, are the same in principle as the one from which I have just quoted, and I think, under the rule of these cases, it must be held that the substantial rights of defendant were prejudiced by the mode of examination adopted by the district attorney, and by his statement of the fact which he desired to show. The court below sustained objections to the questions, but this did not in my judgment obviate the injury which the questions and statement must have produced.

[No. 14283. Department Two. — July 8, 1892.]

C. A. FOX, APPELLANT, v. SOUTHERN PACIFIC
COMPANY, RESPONDENT.

APPEAL — REVIEW OF ORDER GRANTING NEW TRIAL — ERROR IN REFUSING NONSUIT — INSUFFICIENCY OF EVIDENCE — DISCRETION. — Where the court grants a new trial to the defendant, upon the ground that it erred in denying two motions of the defendant for a nonsuit, one made when the plaintiff's case was rested, and the other made after all the evidence was closed, and before the submission of the case to the jury, the new trial is practically granted for insufficiency of the evidence to justify the verdict for the plaintiff, and the order granting it will not be reversed upon appeal, if no abuse of discretion appears.

1D. — NONSUIT AFTER SUBMISSION OF CAUSE. — The court is justified in granting the defendant's motion for a nonsuit, after the evidence on both sides has been heard, where, if the motion had been denied and a verdict found for the plaintiff, it would have been set aside as not supported by but contrary to the evidence.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial.

The fact are stated in the opinion of the court.

William T. Kendrick, and *J. C. Rives*, for Appellant.

John D. Bicknell, for Respondent.

McFARLAND, J. — The verdict and judgment were for plaintiff; on motion of defendant, the court below granted

a new trial, and plaintiff appeals from the order granting said motion.

The motion was made upon nearly all the statutory grounds, including insufficiency of the evidence to justify the verdict. The order granting the motion is as follows: "Defendant's motion for a new trial granted upon the following grounds, to-wit: 1. Court erred in overruling motion for nonsuit, made when plaintiff rested her case, and before any evidence was introduced by defendant; 2. That the court erred in overruling defendant's motion for nonsuit; made after the evidence was closed, and before said cause was submitted to the jury."

If the court had merely granted the new trial without stating the grounds upon which it was granted, or if "insufficiency of the evidence to justify the verdict" had been stated as one of the grounds, it is probable that this appeal would never have been taken; for in that event, it could not have been argued with any plausibility that setting aside the verdict for want of evidence was an abuse of discretion. But practically and substantially, the court did grant a new trial on the ground of the insufficiency of the evidence to justify the verdict, although the judgment of the court to that effect was expressed in the round-about way of holding that the motions for nonsuit should have been granted. If the court believed that the evidence for plaintiff was insufficient to justify the verdict in her favor, and that therefore the first motion for a nonsuit should have been granted, it must necessarily have believed that all the evidence in the case was insufficient to justify such a verdict; for clearly what was introduced after plaintiff had closed her evidence in chief did not in any way strengthen her case. But there was a second motion for nonsuit made after all the evidence was in, and the rule with respect to such a motion is, that "a court is justified in granting defendant's motion for nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict

found for plaintiff, it would have been set aside as not supported by but contrary to the evidence." (*Geary v. Simmons*, 39 Cal. 224.) Practically, therefore, the real question in the case at bar is whether or not the court abused its discretion in holding that the evidence was insufficient to support the verdict; and it is clear to us, from an examination of the evidence, that this question must be answered in the negative.

The order appealed from is affirmed.

DE HAVEN, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 14657. Department Two. — July 9, 1892.]

THOMAS F. JOYCE, RESPONDENT, v. JOHN E. WHITE, APPELLANT.

ENTIRE CONTRACT — PREVENTION OF PERFORMANCE — QUANTUM MERUIT. — Where work has been done under an entire contract, which the defendant, without justifiable cause, prevented the plaintiff from completing, the defendant is liable to the plaintiff for the value of the labor done and materials furnished and used.

NEW TRIAL — STATEMENT — SPECIFICATIONS OF ERROR — INSTRUCTIONS. — A general specification in a statement on motion for a new trial, "that the court erred in giving to the jury instructions asked by plaintiff," is insufficient.

APPEAL from an order of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

Jones & Carlton, for Appellant.

The contract declared on is an entire contract. It is plainly one according to its terms, and the pleadings show conclusively that it was so regarded by plaintiff himself. (*Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337; *Archer v. McDonald*, 36 Hun, 194; 3 Am. & Eng. Ency. of Law, 916 et seq.) Plaintiff cannot recover

without first establishing an absolute breach on the part of defendant. (*Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337; *Jones v. Post*, 6 Cal. 102; *Purdy v. Bul-lard*, 41 Cal. 444; *Cox v. McLaughlin*, 63 Cal. 196; Bishop on Contracts, secs. 682 et seq.; *Clark v. Baker*, 5 Met. 452; 2 Parsons on Contracts, sec. 523; *Marshall v. Jones*, 11 Me. 54; 25 Am. Dec. 260; *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51.)

Richard Dunnigan, for Respondent.

Although the contract was an entire contract, yet the defendant without cause having prevented the comple-tion of the work, he was liable in an action of *indebita-tus assumpsit* for the value of the work done and materials furnished. (2 Parsons on Contracts, sec. 523; *Cox v. Mc-Laughlin*, 76 Cal. 63; 9 Am. St. Rep. 164; *Smith v. First Cong. etc. House*, 8 Pick. 178; *Adams v. Cosby*, 48 Ind. 155; *Manville v. McCoy*, 3 Ind. 150; *Ketchum v. Zeils-dorff*, 26 Wis. 516; see *Hoagland v. Moore*, 2 Blackf. 167; *Rodemur v. Hazelfurst*, 9 Gill, 294; Civ. Code, sec. 1511, subd. 1.)

VANOLIEF, C. — The defendant, having a contract with the superintendent of streets in the city of Los Angeles, to construct a sewer with manholes and flush-tanks through certain streets in that city, entered into a written contract with the plaintiff, by the terms of which the plaintiff agreed to construct all the manholes and flush-tanks required in connection with the sewer, ac-cording to the specifications contained in defendant's contract with the superintendent of streets, at such time as the defendant might direct, so as not to delay the work of constructing the sewer; to furnish all the mate-rial therefor; to do the work subject to the inspection and directions of the superintendent of streets as to manner and materials; and to complete the work in such condition that it would be accepted by the superintend-ent of streets. The defendant agreed to pay per each manhole and flush-tank \$38.50, when the same should

be accepted, and a sufficient amount collected from the property owners for that purpose.

The plaintiff alleges in his complaint that after constructing a certain number of manholes and flush-tanks, according to the contract, and while he was proceeding to perform the contract on his part, the defendant wrongfully, and without any justifiable cause, prevented him from completing the same; and that the work done and materials furnished by him under the contract were reasonably worth \$633.87, for which he prays judgment.

The defendant admits the contract, and that plaintiff commenced the work, but denies that he prevented the plaintiff from proceeding with or from completing the work according to the contract; denies that the work done or materials furnished were of any value whatever; alleges, as a counterclaim, that plaintiff voluntarily abandoned the work, and failed and refused to perform his part of the contract, to the damage of the defendant in the sum of one thousand dollars, for which he prays judgment.

The case was tried by a jury, whose verdict was for plaintiff in the sum of \$464.37, in accordance with which judgment was entered.

The defendant appeals from the judgment, and from an order denying his motion for a new trial.

Counsel for appellant contend that the evidence is insufficient to justify the verdict, in that it does not tend to prove that defendant prevented plaintiff from doing the work according to the contract.

Upon this point the evidence is conflicting; but I think the evidence on the part of the plaintiff so clearly *tends* to prove the averments of the complaint in this respect, that it is unnecessary to make a detailed statement of it here.

Undoubtedly the contract is an entire contract; yet if, as alleged, the defendant, without justifiable cause, prevented the completion of the work, he was liable to plaintiff for the value of the labor done and materials furnished and used.

Four distinct instructions were given to the jury at request of plaintiff, and one at request of defendant. In respect to these, counsel for appellant merely say in their brief: "In view of the evidence, the instructions of the court were clearly error." No particular error in the instructions is specified in the statement on motion for new trial, wherein it is merely said: "The court erred in giving to the jury instructions asked by plaintiff." If there is error in the instructions, counsel for appellant have failed to specify it sufficiently, either in their brief or in their statement, to enable me to discover it. Read together, the instructions seem to have presented the case to the jury fairly.

I think the judgment and order should be affirmed.

TEMPLE, C., and BELCHER, C., concurred.

For the reasons given the foregoing opinion, the judgment and order are affirmed.

McFARLAND, J., DE HAVEN J., SHARPSTEIN, J.

[No. 14718. Department Two. — July 9, 1892.]

ARANETTA HILL, APPELLANT, v. THE BOARD OF
SUPERVISORS OF VENTURA COUNTY, RE-
SPONDENT.

PUBLIC HIGHWAY — PETITION TO SUPERVISORS — WIDTH OF ROAD — CONSTRUCTION OF POLITICAL CODE — VALIDITY OF PROCEEDINGS. — Section 3682 of the Political Code, providing what the petition to the board of supervisors for the laying out of a public highway must contain, does not require it to state the width of the road, and the failure to state it does not render the proceedings void, notwithstanding section 2681 of the same code requires the road to be at least forty feet wide, and authorizes the viewers to report upon the necessity of a greater or practicability of a less width of road than petitioned for. A petition for a road not stating the width must be construed to be a petition for a road at least forty feet wide.

12. — APPROVAL OF BOND. — Where the bond required by section 2683 of the Political Code to accompany the petition is presented with it, though the petition is marked filed a few days before the date of the bond, an order of the board of supervisors, that the bond be filed, and that the

petition be acted upon by the appointment of viewers, is sufficient evidence of an approval of the bond by the board.

1D. — JUSTIFICATION OF SURETIES — RIGHTS OF PROPERTY OWNERS. — The fact that the bond was approved, although the sureties had not justified as required by law, is a mere irregularity, which could not affect the private rights of a property owner. The validity of the proceedings cannot be made to depend upon the correctness of the judgment of the board as to whether the justification of a surety was in accordance with the statute.

1D. — CONDEMNATION OF LAND — SUBSTANTIAL COMPLIANCE WITH STATUTE — RECORDS OF SUPERVISORS — INDULGENCE OF COURTS. — The laying out of a public highway is a proceeding to condemn land, and the mode is in some sense the measure of the power, and it must appear that the statute has been substantially complied with, to render the proceedings valid; yet the courts make very liberal indulgences in favor of the records of the board of supervisors in such proceedings, which, though of great importance, are usually imperfect.

APPEAL from a judgment of the Superior Court of Ventura County.

The facts are stated in the opinion.

W. N. Wilde, for Appellant.

H. L. Poplin, for Respondent.

TEMPLE, C. — This appeal is from a judgment in a proceeding to review the action of the board of supervisors of the County of Ventura in laying out a public highway in that county.

The affidavit or petition upon which the writ was issued is not in the record, as the statute does not make that a part of the judgment roll. From the writ we learn that the alleged want of jurisdiction on the part of the board consisted solely in that the petition asking the board to lay out the road did not state the width of the proposed road, and was not accompanied by a bond, as required by section 2683 of the Political Code, and that no bond was approved as required by section 2683 of the Political Code.

The return recites that a petition had been filed, and sets out a bond, the latter not marked filed, but dated some ten days after the petition was filed, the appointment of viewers, and an order approving the report, and "declar-

ing the amount of damage awarded to each non-consenting land-owner, and that the amount awarded was ordered set apart from the proper road fund, as directed by the statute. As the plaintiff did not accept the award, the final order declaring the proposed road a public highway open to the public was never made.

In the judgment it is adjudged that all the proceedings subsequent to the appointment of viewers "be and the same are hereby set aside and annulled"; and all the proceedings prior to and including the qualification of viewers "be and the same are hereby affirmed."

The alleged defects of jurisdiction, if sustained, would seem to render the entire proceeding void. The record disclosed no special attack upon the proceedings subsequent to the appointment of viewers, or any attack upon any part of the proceedings, except as above stated. It is not easy, under the circumstances, to understand the judgment. But appellant is not aggrieved by that part which is in his favor, and the defendant has not appealed. The proceedings are left still pending with the report of the viewers made, but not acted upon. The writ did not and could not run to the action of the viewers. That could only have been set aside by taking from it its support by annulling the previous proceedings. Whether these proceedings are void is the point of the appeal.

It is well to remember that this is not a proceeding to condemn land. By this proceeding no one is or can be deprived of his property save by his consent. It is the exercise of a legislative power, delegated to the board, though the procedure requires also action of a *quasi* judicial character. The legislature might have conferred the power without the procedure, and without requiring notice or granting a hearing to property holders. It would then have been only a power to determine whether the land to be taken was needed for public uses and the property owner, in the proceedings to condemn which would follow as a consequence of such determination, would have his opportunity to be heard. The

procedure here prescribed leads to but the same determination as to the necessity of taking the land. It was not meant specially for the protection of the individual, but to secure to the public a fair and intelligent use of the power delegated. The mode is here, no doubt, in some sense the measure of the power, and there must, therefore, be a substantial compliance with the conditions prescribed, or the action of the board will be void. Whether there has or has not been a substantial compliance must be determined with a view to the purpose of the limitations. In effect, the statute (Pol. Code, sec 2681) requires, as a prerequisite to the exercise of this power on the part of the board, a petition signed by at least ten freeholders of the road district in which it is proposed to lay out the road. The next section is as follows:—

“Sec. 2682. Petition must set forth and describe particularly the road to be abandoned, discontinued, altered, or constructed, and if the road is to be altered, laid out, or constructed, the general route thereof, over what lands, who the owners thereof are, whether such of them as can be found consent thereto, and if not, the probable cost of such right of way where such consent is not had, the necessity for and the advantages of the proposed road.”

When such a petition has been filed, evidently the conditions have been complied with which were required to set the power in motion, and the board may act. Appellant attempts to import into these requirements a statement as to the width of the road, because in section 2681 of the Political Code the viewers are authorized to report upon the “necessity of a greater or the practicability of a less width of road than petitioned for”; and from the fact that there is no other direction for ascertaining the width, and all roads must have width, and whether this be more or less affects the questions which the board is called upon to determine. This seems quite plausible, but we are not here dealing with a court which is confined to the facts contained in

a written statement, but with a legislative body exercising a power ample as the subject to be dealt with, only as limited by express provision as to the mode. The road must be at least forty feet wide. (Pol. Code, sec. 2681.) The petition was, therefore, for a road at least forty feet wide, even if no width is mentioned.

The statute above shows that the board may fix upon a different width from that stated in the petition, and after the filing of the report of the viewers, the land-owners are allowed an opportunity to be heard, and may present their views upon this very subject. The statute is imperfect, and does not expressly prescribe what shall be done in case the board disagrees with the viewers as to the width, or elects to establish a road upon a different route, but still, it is evident that such power is vested in the board.

I think, therefore, although some provisions of the statute were evidently written under the impression that the petition would state the width of the road, yet since the legislature has expressly declared, in section 2682, what the petition must contain to set the power in motion, and does not require such facts to be stated, the failure does not render the proceedings void.

The petition was marked filed a few days before the date of the bond, but both seem to have been presented together. Of course no action was had or asked before the bond was presented, and as shown by the *nunc pro tunc* order, was approved and ordered filed by the board.

This order was complained of, because it was made after service of the writ herein. This was not an attempt surreptitiously to change the record so as to avoid an objection. If the recitals are true, I see nothing wrong in it. Whether it is conclusive is not involved here. The minutes before amendment showed that the bond was ordered filed, and the petition acted upon by the appointment of viewers. In *Humboldt County v. Dinsmore*, 75 Cal. 604, these acts seem to have been held to indicate that the bond was approved. While it must appear that the statute has been substantially complied

with, courts make very liberal indulgences in favor of these records, which, although of great importance, seem nearly always very imperfect.

As to the point that the bond was approved, although the sureties had not justified as required by law, it is plainly an irregularity only, and one which did not affect the private rights of the appellant. The validity of the proceedings establishing public highways cannot be made to depend upon the correctness of the judgment of the board as to whether the justification of a surety was in accordance with the statute.

I think the judgment should be affirmed.

BELCHER, C., and VANOLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

MOFABLAND, J., DEHAVEN, J., SHARPSTEIN, J.

[No. 14851. Department One. — July 11, 1892.]

J. R. DOTY, RESPONDENT, v. E. F. O'NEIL, APPELLANT.

CLAIM AND DELIVERY — STATUTE OF FRAUDS — CHANGE OF POSSESSION —
CONSTRUCTIVE POSSESSION — INSTRUCTIONS — REVIEW UPON APPEAL. —
In an action to recover the possession of personal property, involving a question as to actual and continued change of possession, under the statute of frauds, where it is claimed by the defendant upon appeal that the instructions for plaintiff tended to mislead the jury to infer that merely constructive possession of the property was sufficient to uphold a transfer of the property to the plaintiff, as against an attaching creditor, the jury could not be misled, where the instructions, taken together as a whole, preclude such inference, and where it appears that even if the instructions objected to were not sufficiently definite as to the nature of the possession required, those given at the request of the defendant supplied the defect, and were not inconsistent therewith.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.

The facts are stated in the opinion.

Graves & Graves, for Appellant.

A sale under the circumstances of this case is void under section 3440 of the Civil Code. (*Stevens v. Irwin*, 15 Cal. 506; 76 Am. Dec. 500; *Engles v. Marshall*, 19 Cal. 320; *Etchepare v. Aguirre*, 91 Cal. 288; *Cahoon v. Marshall*, 25 Cal. 197; *Ruddle v. Gibens*, 76 Cal. 457; *Dean v. Walkenhorst*, 64 Cal. 78; *Bunting v. Saltz*, 84 Cal. 168.)

Wilcoxon & Bouldin, and W. B. Dillard, for Respondent.

The instructions given were in accordance with the law. (2 *Parsons on Contracts*, 184; *Renninger v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 693; *Claflin v. Rosenberg*, 42 Mo. 439; 97 Am. Dec. 340, and note; *Williams v. Lerch*, 56 Cal. 384; *Walden v. Murdock*, 23 Cal. 552; 83 Am. Dec. 135; *Goldstein v. Nunan*, 66 Cal. 544; *Gould v. Huntley*, 78 Cal. 402; *Hogan v. Cowell*, 73 Cal. 212.) If, however, the instructions were capable of misleading, we do not think they can be held to have had that effect when taken in connection with the numerous and copious instructions asked and given at the request of the appellant.

VANDLIEF, C.—Action to recover the possession of personal property, or the value thereof. Trial by jury. Verdict and judgment for plaintiff. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The property consists of live-stock,—principally dairy cows,—which plaintiff claims to have purchased from his father, B. F. Doty. The defendant, as sheriff of San Luis Obispo County, took the property by virtue of an execution against B. F. Doty, and his defense to the action is, that the property in question was the property of B. F. Doty, and subject to the execution by virtue of which he took it.

1. Counsel for appellant claim that the evidence was insufficient to prove that the sale of the property from B. F. Doty to the plaintiff was accompanied by an immediate delivery, or followed by an actual and continued

change of possession; and that it was therefore void as against the creditors of B. F. Doty.

The only evidence as to immediate delivery and change of possession is the testimony of plaintiff and B. F. Doty; and their testimony not only tends to prove, but if true is sufficient to prove, an immediate delivery, followed by an actual and continued change of possession. Nor is there anything in the nature of their testimony, or in the circumstances disclosed, tending to discredit these witnesses.

2. The second and fourth instructions given to the jury at the request of plaintiff are as follows: "2. Every transfer of personal property, if made by the person having possession or control of the property, must be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing transferred, or the transfer is conclusively presumed to be fraudulent and void, against those who are his creditors while he remains in possession. But a change in location of the property intended to be transferred is not in all cases essential to constitute a valid transfer. In all cases due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property. And if you find from the evidence that there was an immediate delivery of the actual possession and control of all the property described in the bill of sale from B. F. Doty to plaintiff, at the date thereof, and that such delivery was followed by an actual and continued change of possession and control in plaintiff from that time to the taking by defendant, you will be justified in finding that there was a proper delivery under said bill of sale." "4. In determining what it takes to constitute a delivery and change of possession of personal property upon a sale of it, the jury should take into consideration the character of the property, and the situation of the parties at the time of the sale; and in this case, if the jury find from the evidence that the plaintiff purchased the property in good faith, and for a

valuable consideration, before the execution introduced in evidence was levied upon the property, that plaintiff had done everything which could have reasonably been done, under the circumstances, by the way of taking possession of the property under the sale to him, then the property would not be liable to be taken on execution, unless you should find from the evidence that the sale was not accompanied by immediate delivery, followed by an actual and continued change of possession of the property sold, the rule of the law requiring the change of possession of personal property upon the sale of it, in order that the sale be not fraudulent as against creditors, only requires such a change of possession as the articles sold will conveniently and reasonably admit of."

Counsel for appellant contend that these instructions are erroneous, in that they tended to mislead the jury "to infer that constructive possession would answer the purpose."

At request of defendant, the court further instructed the jury as follows: "Every transfer of personal property, and every lien thereon, other than a mortgage when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors. The word 'actual' means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to *potential*, *possible*, *virtual*, or *theoretical*.

"If you find from the evidence that at the time of the transfer by B. F. Doty to the plaintiff of the property described in the complaint, the said B. F. Doty was in the actual and exclusive possession of the tract of land from which the said property was taken by the sheriff, and had been so in possession for a long time prior

thereto, and that the said transfer took place upon the said tract of land, you must find for the defendant, unless you should find that the possession of the land changed with the personal property sold and delivered, as I have instructed you.

"Neither the fact of the payment of a valuable consideration by plaintiff to B. F. Doty for the property in controversy, nor that said sale was honest, is of any consequence. If you still believe that said sale from B. F. Doty to J. R. Doty, the plaintiff, was not accompanied by an immediate delivery, and an actual and continued change of possession, you should find for the defendant."

Taken together, these instructions seem to preclude any inference by the jury that merely constructive possession would be sufficient. If the two instructions objected to were not sufficiently definite as to the nature of the possession required, those given at request of defendant supplied the defect. The instructions given at request of plaintiff are not inconsistent with those given at request of defendant.

I think the judgment and order should be affirmed.

TEMPLE, C., and BELOHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14784. Department One. — July 11, 1892.]

EMMA A. WADDINGHAM, APPELLANT AND RESPONDENT, v. L. E. TUBBS, RESPONDENT AND APPELLANT.

NEW TRIAL — TIME FOR SERVICE OF NOTICE — NOTICE OF DECISION — NOTICE OF MOTION BY SUCCESSFUL PARTY. — A notice of intention to move for a new trial, by the party in whose favor judgment has been rendered, served upon the adverse party, which contains the title of the cause, and which states that "a motion will be made to set aside and vacate the decision and judgment heretofore rendered and entered herein," contains a sufficient notice in writing that a decision of the court had theretofore been rendered to require the adverse party to serve and file his notice of intention for a new trial within ten days thereafter.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial.

The facts are stated in the opinion.

Harris & Gregg, for Plaintiff.

Rolfe & Freeman, for Defendant.

VANOLIEF, C. — This is an action to quiet the alleged title of plaintiff to lots numbered 7, 8, and 9, in block 42, of the town of Ontario, in the county of San Bernardino. The cause was tried by the court, and the judgment was in favor of plaintiff for lots 8 and 9, and in favor of defendant for lot numbered 7.

Each party moved for a new trial upon a distinct bill of exceptions. Both motions were denied, and each party has appealed, — the defendant from the judgment against him as to lots 8 and 9, and from the order denying his motion for a new trial; and the plaintiff from the judgment against her as to lot 7, and from the order denying her motion for a new trial. Both appeals are brought upon the same transcript.

1. Upon the appeal of defendant it will be necessary to consider only one question, viz.: Did the defendant serve his notice of intention to move for a new trial within the time prescribed by section 659 of the Code of Civil Procedure?

The decision of the court was rendered on December 27, 1890. Written notice of defendant's intention to move for a new trial was not served until January 24, 1891, when defendant's attorneys admitted the service, but expressly reserved and saved their right to object to the notice on the ground that it was too late.

Section 659 of the Code of Civil Procedure requires the notice of intention to move for a new trial to be served upon the adverse party "within ten days . . . after notice of the decision of the court"; and respondent (on this appeal) contends, — 1. That appellant had actual notice of the decision of the court on December 29, 1890, and then so acted upon such actual notice as to waive formal written notice; and 2. That respondent served written notice of the decision upon appellant's attorneys on January 6, 1891. The first of these contentions is grounded upon the following facts of record: "On the twenty-ninth day of December, 1890 (two days after the decision), counsel for defendant and counsel for plaintiff, upon notification by counsel for defendant, and defendant in person, made argument in open court before said judge, upon the apportionment of the costs of said trial under the decision of the court; and said judge announcing thereafter that each party should pay its own costs of trial, it was then suggested and consented by the respective parties that the said judge might insert in the conclusions of law in said case that each party should pay his own costs."

The ground of the second contention, viz., that written notice of the decision was served on January 6, 1891, is that on that day respondent served on the attorneys for defendant her written notice of intention to move for a new trial, which, among other things, stated: "The defendant will take notice that the plaintiff intends to move the court to set aside and vacate *the decision and judgment heretofore rendered and entered herein*, and to grant a new trial in this case upon the following grounds: 1. Insufficiency of the evidence to justify the findings and decisions," etc.

Service by copy of this notice on January 6, 1891, was admitted by defendant's attorneys.

As to whether the actual notice to defendant of the decision of the court, and his action upon that notice on December 29th, constituted a waiver of formal written notice of the decision, the cases seem not quite harmonious. (See *Biagi v. Howes*, 66 Cal. 469; *Gray v. Winder*, 77 Cal. 527; *San Fernando H.A. v. Porter*, 58 Cal. 81; *Barron v. Deleval*, 58 Cal. 95; *Mullally v. Benevolent Society*, 69 Cal. 559; *Dow v. Ross*, 90 Cal. 562.) Perhaps they may be so reconciled as to sustain the position of respondent; but it is unnecessary to decide this question, since I think that under the circumstances plaintiff's notice of intention to move for a new trial, served on defendant January 6th, contained a sufficient notice in writing that a decision of the court had theretofore been rendered in this case, although that notice also stated that plaintiff intended to move for a new trial. The notice contained the title of the cause, and the language is, "the decision and judgment heretofore rendered and entered herein," which means the decision *which was* heretofore rendered herein, and must have been so understood. The code requires no particular form of notice. Nor does it require notice of what the decision was. Simple notice in writing that a decision has been rendered is all that is required. Such notice was served on defendant on January 6, 1891; yet defendant did not give notice of his intention to move for a new trial until the twenty-fourth day of that month.

No point is made on defendant's appeal from the judgment.

2. On the appeal by the plaintiff from the judgment as to lot 7, no point is made; but on her appeal from the order denying her motion for a new trial, her counsel contend that the finding by the court to the effect that lot 7 was conveyed to her by her husband without consideration, and for the purpose of delaying and defrauding his creditors, is not justified by the evidence. But after a careful examination, I think the evidence on

the part of the defendant has a substantial tendency to prove the findings in question.

I think the entire judgment, and both orders appealed from, should be affirmed.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14712. Department One. — July 11, 1892.]

**CUYAMACA GRANITE COMPANY, APPELLANT, v.
THE PACIFIC PAVING COMPANY, RESPONDENT.**

PARTNERSHIP — ACTION FOR ACCOUNTING AND SETTLEMENT — ASSIGNMENT OF INTEREST — ASSIGNOR A NECESSARY PARTY. — In an action for an accounting and settlement of a partnership, where it appears that the defendant was in partnership with the plaintiff's assignor and another person, all of whom were jointly interested in the profits of the partnership, and it also appears that no settlement of the partnership matters had ever been made between the original partners, all of them are necessary parties to the action, and a demurrer to the complaint for defect of parties, in that the partner who was plaintiff's assignor, and who was not joined, was a necessary party to the complete determination of the controversy, is properly sustained.

ID. — PLEADING — PARTNERSHIP IN CONTRACTS FOR STREET WORK — COLLECTIONS TO BE MADE BY COPARTNER — INSUFFICIENT COMPLAINT. — When the complaint in such action alleges that the defendant agreed with the plaintiff's assignor and another person to do certain street work with them as partners, and that the defendant should appoint a book-keeper who should keep all accounts, pay all bills, and collect all moneys belonging to the copartnership, and that the profits arising from the work should be equally divided, and which alleges that the work has been performed, and that a large sum of money is still uncollected, but which does not aver that the defendant failed to perform any of the conditions of the agreement to be performed by the defendant, or that the defendant was neglecting or refusing to collect the unpaid money, or was insolvent or likely to become so, or unable or unwilling to respond to any just claim or demand against the defendant, or that there was any danger that the money, when collected by the defendant, would be misappropriated, squandered, or lost, fails to state a cause of action.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

Hunsaker, Britt & Goodrich, for Appellant.

The complaint sets forth a partnership between plaintiff and defendant; a dissolution; the existence of unsettled accounts, and a balance in favor of the plaintiff; and demands an accounting and a judgment for the balance, and therefore shows a good cause of action. (*Ludington v. Taft*, 10 Barb. 447; *Cardin v. Donegan*, 15 Kan. 495.) If it be contended that the plaintiff is or was not a partner of defendant, and therefore cannot sue, we reply that if the assignee of a partner, who seeks to enforce no right of the firm, but alleges a dissolution of the partnership, asks for the share of the profits to which he as assignee is entitled, it will be decreed to him. (*Matthewson v. Clarke*, 6 How. 122; *Still v. Focke*, 66 Tex. 715; *Marx v. Goodnough*, 16 Or. 26; *Strong v. Clawson*, 5 Gilm. 347.) After dissolution, either party has the power to compel an adjustment of all the business of the firm. (*Ligare v. Peacock*, 109 Ill. 101; *Gates v. Fraser*, 6 Brad. App. 229; *Miller v. Brigham*, 50 Cal. 615.) In the absence of an express agreement to the contrary, one partner has the same rights in the management of the partnership business as the other; and unless it clearly appears from the terms of the partnership contract that plaintiff was to be excluded from participation in the collection of the debts due the partnership, the court erred in its ruling. (1 Ewell's *Lindley on Partnership*, 2d ed., p. 301.)

Luce & McDonald, for Respondent.

The interest of Haskins and Schulenberg was joint, and therefore Haskins should have been joined as a party plaintiff, or if his consent to be joined as plaintiff could not have been obtained, he should have been made a defendant. (Code Civ. Proc., sec. 382.) The defendant contracted and dealt with Haskins and Schulenberg jointly, as one party in fact, and is entitled to have the

rights of both settled in and determined by one action. The law will not tolerate a division of a joint right of action into several actions. (*Nightingale v. Scannell*, 6 Cal. 507; 65 Am. Dec. 525.) And one without whose presence in an action no complete determination of the subject thereof can be had must be made a party to it. (Code Civ. Proc., sec. 389; *Harrison v. McCormick*, 69 Cal. 616, 621; *O'Connor v. Irvine*, 74 Cal. 435, 436, 442.)

BELCHER, C.—It is alleged in the complaint in this case that at all the times mentioned therein, both the plaintiff and defendant were corporations, organized under the laws of this state; and that in 1889, A. Haskins and A. R. Schulenberg made and entered into a certain contract of copartnership with the defendant, a copy of which is set out and marked "Exhibit A."

This contract was to the effect that Haskins and Schulenberg would use their best endeavors to secure from the city of San Diego contracts for bituminous rock street pavements in that city, and in the event of obtaining any such contracts, would immediately assign and transfer the same to the defendant; that upon such contracts being secured and assigned, the work therein provided for should be done by Haskins and Schulenberg and the defendant as partners; that the defendant, at its own expense, would appoint a book-keeper, who should keep all accounts, pay all bills, and collect all moneys belonging to the copartnership; and that the profits arising from the work should be equally divided, one half to Haskins and Schulenberg, and the other half to the defendant.

It is then alleged that in pursuance of the terms of the said contract of copartnership, Schulenberg, on behalf of Haskins and himself, procured from the city of San Diego, in December, 1889, a contract for the paving and curbing of Sixth Street in said city, and assigned the same to the defendant; that the work provided for was done as agreed, and was completed and accepted by the

city on or about July 25, 1890, the said partnership being in effect thereby dissolved; that the total value of the work performed under the contract amounted to the sum of \$51,680.72; that in January, 1891, Schulenberg assigned and transferred all his interest and claim in and to the said contract, and the profits arising therefrom, to the plaintiff; "that no settlement of the copartnership accounts has ever been made between plaintiff and defendant, nor between Haskins and Schulenberg and defendant, nor between said Haskins or said Schulenberg and defendant, though plaintiff has requested and demanded a final settlement of defendant with respect thereto, which defendant has refused, except on terms unjust and unfair to plaintiff, and not in accordance with said contract"; that plaintiff is informed and believes that upon a true and just settlement of said accounts a large sum of money, to wit, about fifteen thousand dollars, would be due from defendant to plaintiff; and that according to plaintiff's information and belief, there is outstanding and due from various persons to said copartnership concern about nineteen thousand dollars; and that defendant, assuming that it has the sole and exclusive right to collect the outstanding claims, at such times and in such manner as suits its convenience, and to postpone the settlement of the partnership accounts between it and plaintiff until said outstanding accounts are all collected, refuses to make any settlement with plaintiff, though requested so to do.

And the prayer is for an accounting, for the appointment of a receiver to collect the outstanding demands, and for judgment, etc.

The defendant demurred to the complaint, on the grounds,—1. That there was a defect of parties plaintiff, in that A. Haskins was a necessary party to the complete determination of the several matters and things complained of; and 2. That the complaint did not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and, the plaintiff

declining to amend, gave judgment for the defendant, from which plaintiff appeals.

1. It is clear, we think, that the demurrer was properly sustained upon the first ground specified therein. It appears that Haskins and Schulenberg were partners with defendant in the street-paving contract, and were jointly interested with defendant in the profits arising therefrom. The plaintiff, by the assignment, succeeded only to Schulenberg's interest in these profits, and was thereafter jointly interested in them with Haskins. No settlement of the partnership matters had ever been made between any of the parties. It is apparent, therefore, that no complete determination of the controversy could be had without the presence of Haskins. This being so, he was a necessary party, and should have been brought in. (Code Civ. Proc., sec. 389; *Harrison v. McCormick*, 69 Cal. 620, 621.) If his consent to be joined as plaintiff could not be obtained, then he should have been made a defendant, the reason therefor being stated in the complaint. (Code Civ. Proc., sec. 382.)

2. We also think that the demurrer was properly sustained upon the second ground specified. It appears that it was expressly stipulated in the agreement made between Haskins and Schulenberg and the defendant, that the defendant should appoint a book-keeper, who should collect all moneys becoming due under the contract with the city, and that the sum of about nineteen thousand dollars remained uncollected when this action was commenced. It is not averred that the defendant had failed to perform any of the conditions of the agreement to be performed on its part, or that it was neglecting or refusing to collect the unpaid money, or that it was insolvent or likely to become so, or unable or unwilling to respond to any just claim or demand against it, or that there was any danger that the money, when collected by defendant, would be by it misappropriated, squandered, or lost. Under these circumstances, we fail to see how any right of action had arisen in favor of the plaintiff when this action was instituted.

We advise, therefore, that the judgment be affirmed.

VANOLIEF, O., and HAYNES, O., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14619. Department One. — July 11, 1892.]

**FRANK N. TOWNSEND, APPELLANT, v. J. Q. TUFTS
ET AL., RESPONDENTS.**

VENDOR AND PURCHASER — ACTION TO RECOVER PURCHASE-MONEY PAID — TIME OF ESSENCE — PLEADING — INSUFFICIENT COMPLAINT — WANT OF PERFORMANCE BY PLAINTIFF. — A complaint by a purchaser to recover money paid upon a contract for the purchase of land, which alleges that by the terms of the contract the sum sued for was to be paid down, and the remainder of the purchase-money was to be paid in installments, and that upon the payment of the last installment the vendor was to execute a deed of the land; that time was made the essence of the contract by express terms; and that at the maturity of the contract the vendors failed and refused to execute a deed; but which does not allege a payment of any deferred installment, or a tender of performance, or an excuse for a failure to make the tender, or any rescission of the contract. — does not state a cause of action.

ID. — MUTUAL NEGLIGENCE TO PERFORM — RESCISSION — FIRST BREACH BY PURCHASER — TENDER AND DEMAND OF CONVEYANCE. — The mere neglect of both parties to such contract to perform the contract on the day fixed for its performance could not, without anything more, operate as a rescission thereof; and when the complaint shows a first breach of the contract on the part of the purchaser, by failure to pay the first deferred payment a full year before the vendors were required to convey, a full tender on his part of the remainder of the purchase-money due, and a demand for a deed, is essential to a recovery of the purchase-money paid, and it is not enough to allege a refusal of the vendors to make and tender a deed at the date fixed for conveyance.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Jones & Carlton, and *R. L. Horton*, for Appellant.

When the respondents failed, on the sixth day of
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March, 1890, to make and tender appellant a deed to the premises described in the complaint, as they had bound themselves to do in their several contracts, then the contracts ceased to exist, and no recovery could be had on them by any of the parties thereto. The several sums paid thereon was money had and received by respondents for the use and benefit of appellant, and subject to be recovered by him. (*Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257; *White v. Buell*, 90 Cal. 177.)

Albert M. Stephens, for Respondents.

Time was made of the essence of the contract. The second installment of the purchase-money was not paid nor tendered by the purchaser. Covenants to pay installments are independent. The vendor is under no obligation to do any act at maturity of the intermediate installment. The purchaser must then pay. (*Hill v. Grigsby*, 35 Cal. 656; *Rourke v. McLaughlin*, 38 Cal. 200.) Time being of the essence of the contract, and the purchaser having failed to tender or pay the intermediate installment, he has himself broken the agreement by his own act, and cannot, of course, recover. The payment of the intermediate installment was a condition precedent, without the fulfillment of which the vendee could have no rights. (Civ. Code, sec. 1439.) If the covenants were even dependent, the plaintiff could not recover anything without offer of performance. (*Dennis v. Strassburger*, 89 Cal. 583; *Newton v. Hull*, 90 Cal. 487; Civ. Code, sec. 1437.)

HAYNES, C. — Defendants demurred to the complaint, the demurrer was sustained, and the plaintiff having declined to amend, judgment passed for defendants; from which judgment the plaintiff appeals.

The facts alleged in the complaint are, that on March 6, 1888, the defendants entered into a contract with one Parkovitch, whereby they agreed to sell, and said Parkovitch agreed to buy, a certain parcel of land for the sum

of two thousand four hundred dollars, of which sum one third was paid down, and the remaining two thirds was agreed to be paid in two equal annual payments, the last of which fell due March 6, 1890; "at which time," the complaint alleges, "by the terms of which agreement, defendants were to execute and deliver to said Parkovitch or his assigns a good and sufficient deed of grant, bargain, and sale, conveying to him or his assigns the title to said land."

The complaint further alleges that time was made the essence of the contract by express terms; that on March 28, 1889, Parkovitch assigned said contract, and all sums of money paid thereon, to the plaintiff, of all which defendants had notice; that at the maturity of the contract defendants failed and refused, and ever since have failed and refused, to convey; that neither plaintiff nor Parkovitch have ever been in possession (the lands being vacant and unoccupied), and that the defendants have not paid to plaintiff any part of the eight hundred dollars so received by them.

The complaint contains no allegation of the payment, nor of any tender or offer to pay either of the deferred payments, nor of any demand for a deed of conveyance, nor of any inability to convey, nor of any rescission, mutual or otherwise, of the contract, unless the failure of the defendants to make and tender a deed to the plaintiff on the sixth day of March, 1890 (that being the day specified in the contract for the payment of the last installment of the purchase-money and for the conveyance of the land), should be held to operate as a rescission or termination of the contract; and this is the sole ground upon which appellant seeks to reverse the judgment.

The appellant contends that by the failure of defendants to tender a deed on that day the contract ceased to exist, and that thereupon he became entitled to recover back the money paid; and cites *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257; and *White v. Buell*, 90 Cal. 177.

The last two cases cited are clearly distinguishable

from the case under consideration. In *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, the plaintiff paid one thousand dollars upon the execution of the agreement, but failed to pay the seven thousand five hundred dollars when the same became due, and never offered to pay the same until about ten months after maturity, when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund the one thousand dollars paid, and elected to rescind the agreement. Thereupon the plaintiff brought suit to recover the one thousand dollars, and alleged in his complaint the facts above stated, as well as a portion of the contract which provided that upon his failure to make the deferred payment the defendant should be released from all obligation to convey, and all money paid thereon should be as liquidated damages for plaintiff's non-fulfillment of the contract. Under these circumstances, this court held that the plaintiff was entitled to recover the one thousand dollars paid by him, less such actual damages as the defendants might have sustained by plaintiff's breach of the contract, if such damages had been pleaded, following in this respect *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187. In *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, it must be observed there was a tender by the plaintiff, a demand for a deed, and an express rescission of the contract by the defendant, as was his right under the terms of the contract, and that the plaintiff acquiesced in the rescission by bringing his suit. In the case at bar, however, there was no tender of payment or demand for a deed, and hence the defendants were not called upon to elect whether they would insist upon performance, as they might have done under the authority of *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, *Smith v. Mohn*, 87 Cal. 489, and *Banbury v. Arnold*, 91 Cal. 606; and that being true, the mere neglect of both parties to perform the contract on the day fixed for its performance could not, without anything more, operate as a rescission. The complaint, it is true,

alleges that defendants "failed and refused" to execute to plaintiff a deed; but in the absence of an allegation of tender of the purchase-money and demand for a deed, this allegation must be read in the light of the terms of the contract, which does not make the execution and delivery of the deed a condition precedent to the payment of the last installment of the purchase-money, but does fix the time for the execution of the deed at the time fixed for such final payment.

Under the well-settled authorities, the plaintiff, under the terms of this contract, must have tendered performance, and alleged such tender, to enable him to maintain his action, unless he could excuse his failure to make the tender by alleging his ability and readiness to pay, and that the tender was not made because of defendants' refusal to perform on their part. Besides, in the absence of an allegation that the first deferred payment had been made, the plaintiff having specified, and seeking to recover, only the payment made at the date of the contract, the complaint shows a breach of the contract on his part a full year before defendants were required to convey.

In *White v. Buell*, 90 Cal. 177, cited by counsel, the purchaser had the right, under the contract, to terminate it by forfeiting the first payment of one thousand dollars, his failure to pay either the first or second deferred payments operating, by the express terms of the contract, as a termination of it, the penalty therefor being the forfeiture of the payment made at the date of the contract only, and not of the subsequent payment, which he was permitted to recover back.

Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, also cited by counsel for appellant, has been overruled upon the point to which it is cited in *Newton v. Hull*, 90 Cal. 487.

The complaint contains four counts, or causes of action, each upon a separate contract, but as all are stated in the same terms and allege the same facts, it is not necessary to notice them further.

For the reasons above given, we advise that the judgment be affirmed.

VANOLIEF, C., and BELOHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14707. Department One. — July 12, 1892.]

W. J. BROWN, APPELLANT, v. E. F. O'NEAL, RESPONDENT.

STATUTE OF FRAUDS — SALE OF PERSONAL PROPERTY OWNED IN CO-TENANCY — CHANGE OF POSSESSION. — Although the statute of frauds is not applicable to a sale by a joint owner or co-tenant of personal property of his interest to a third party, where his co-owner has exclusive possession, yet where one of the co-owners of personal property, who is in the sole possession thereof, sells his interest therein to a third party, there must be an immediate delivery, followed by an actual and continued change of possession, as required by section 3440 of the Civil Code, or the sale will be void as to his creditors.

ID. — FRAUDULENT TRANSFERS — ATTACHMENT BY SUBSEQUENT CREDITOR — CONSIDERATION — GOOD FAITH. — A transfer of personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is fraudulent and void as against the claim of any creditor who is such creditor during any of the time the person making the transfer remains in possession, and such creditor may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor. The consideration paid by the purchaser or the good faith of the transaction cannot be inquired into for the purpose of evading the force and effect of the law declaring such transfer fraudulent and void.

APPEAL from a judgment of the Superior Court of San Luis Obispo County.

The facts are stated in the opinion.

J. M. Wilcoxson, and Wilcoxson & Bouldin, for Appellant.

The court erred in holding that the sale of R. S. Brown to plaintiff was within section 3440 of the Civil Code, or the statute of frauds, and void. The possession of Tay-

lor was the possession of plaintiff, and from the time of the sale, the property was in Taylor's possession, and the possession of one joint tenant being the possession of the other, the plaintiff at all times after the transfer was in the possession of the horse. (Freeman on Cotenancy, sec. 219; Freeman on Executions, sec. 153; *Walling v. Miller*, 15 Cal. 38.) The Bank of San Luis Obispo was not a creditor until over a year subsequent to the sale to plaintiff, and consequently is not in a position to attack the sale. (See *Horn v. Vol. W. Co.*, 13 Cal. 62, 72; 73 Am. Dec. 569.) The judgment, upon the findings, should have been for the plaintiff. The sale was *bona fide*, for value given, and such possession transferred as the nature of the property would admit of; and the title vested in the vendee on February 5, 1890, more than a year before the indebtedness accrued upon which it was attached. (*Williams v. Lerch*, 56 Cal. 330.)

Graves & Graves, for Respondent.

The rule that a tenant in common of personalty may sell his interest, and the vendee will acquire a good title, as against creditors of the vendor, without delivery of possession, does not apply to cases where the tenant in common, as in this case, is in the sole possession. (Freeman on Executions, sec. 153; Freeman on Cotenancy, sec. 167; *Brown v. Graham*, 24 Ill. 630.) Where a co-owner sells to a third person his interest in the common property, there must be an immediate delivery and continued change of possession, as required by section 3440 of the Civil Code, or the sale will be void as to creditors. (*Newell v. Desmond*, 63 Cal. 243.) Owners in common of personal property have each an independent, though undivided, interest therein, and are equally entitled to possession, and each has the right to dispose of his own undivided share without the consent of the other. In case of a sale by co-owner, the vendee becomes a tenant in common with the other, and if he has actual possession, has a right to maintain that possession against the other. (Schouler on Personal Property, 196, 197.)

Appellant's proposition, that the Bank of San Luis Obispo was not a creditor of the vendor until over a year subsequent to the sale, makes no difference, for section 3440 of the Civil Code "denounces as fraudulent and void, as against the claims of a creditor who is such creditor during any of the time that the person who made the transfer remains in possession, after a transfer which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession." (See *Watson v. Rodgers*, 53 Cal. 401; *Edwards v. Sonoma Valley*, 59 Cal. 148.)

BELCHER, C.—This is an action to recover possession of a horse, alleged to have been wrongfully taken by the defendant from the plaintiff, or in case delivery cannot be had, for the value of plaintiff's one-half interest in the animal, and damages for its detention.

The facts of the case, as found by the court below, are substantially as follows:—

On February 5, 1890, R. S. Brown and W. H. Taylor were the joint owners of a stallion, each owning a half interest. Taylor was an invalid, and Brown, by agreement between them, had possession of the animal, and was to manage him during the breeding season of that year, lasting from February 1st to July 15th, and after paying all expenses, divide equally the proceeds arising from his services.

On the day named Brown sold, and by bill of sale conveyed, all his interest in the stallion to W. J. Brown, the plaintiff, for the sum of \$650, which sum was paid by plaintiff at the time. Taylor was spoken to about the sale at the time it was made, and refused to give his consent thereto unless the seller should retain possession of the stallion. Plaintiff consented to this arrangement, and the horse remained in possession of R. S. Brown until about February 1, 1891, when Taylor, plaintiff, and R. S. Brown entered into a new agreement, whereby the latter was to have the possession, control, and management of the stallion during the breeding season of that year, and pay

all expenses of his keeping, care, and management, and receive one third of the proceeds derived from his services, and the other two thirds of the proceeds were to be equally divided between Taylor and the plaintiff.

On March 15, 1891, R. S. Brown and P. W. Murphy, jointly executed their promissory note to the Bank of San Luis Obispo for the sum of \$1,057.30, due one day after date. On April 7, 1891, the note not being paid, the bank commenced an action thereon in the superior court of San Luis Obispo County, and took out a writ of attachment. The writ was placed in the hands of the defendant, who was then the sheriff of the county, and under it he as such sheriff levied upon, seized, and took into his possession the said stallion.

The value of the stallion was three thousand dollars, and the levy of the attachment upon him, as aforesaid, constitutes the taking alleged in the complaint.

The plaintiff demanded the return of the animal to himself, and his demand being refused, he commenced this action on April 10, 1891.

Upon these facts the court below gave judgment for the defendant, and the plaintiff appeals on the judgment roll.

The first question presented for decision is, was the sale void, as against the creditors of the seller, under the provisions of section 3440 of the Civil Code? That section is as follows:—

“Every transfer of personal property is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession,” etc.

Appellant contends that this section has no application to the case, for the reason that “the property sold—an undivided interest in a stallion—was not capable of delivery”; and as the other joint owner objected and re-

fused to consent to a change of possession of the animal, no actual change was necessary. "In other words," he says, "his position is that the possession of Taylor was the possession of plaintiff, and that from the time of the sale the property was in Taylor's possession; and the possession of one joint tenant being the possession of the other, that plaintiff at all times after the transfer was in possession of the horse."

If Taylor had sold his interest in the horse, and one of his creditors had afterwards taken it under attachment, the rule invoked would have been applicable, but it is not applicable to the facts shown here. The law on this subject is stated in Freeman on Cotenancy, sec. 167, as follows: "If A and B together own personal property of which A is in actual possession, and B sell his moiety to C, the possession of A immediately becomes the possession of C also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in common with A, it is not necessary that C should take actual possession with A to make his purchase good under the statute of frauds, as against the creditors of B. If A, the co-tenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no co-tenant whose actual possession could have operated for the benefit of A's vendee." And again, in his work on Executions, sec. 153, the same author says: "If the co-tenant selling is in the sole possession, he ought to give possession to his vendee; but if the other co-tenants are in possession, the vendor has no right to take it from them. He may, therefore, from necessity, make a valid sale without placing the property in the custody of his vendee." (And see *Brown v. Graham*, 24 Ill. 630, and *Newell v. Desmond*, 63 Cal. 242.)

The law being as above stated it is clear that judgment was properly entered against the appellant, unless his second contention can be sustained. The contention is, that the Bank of San Luis Obispo was not a creditor of Brown until more than a year after the sale, and con-

sequently was not in a position to attack the sale. And it is said: "The statute, we think, visits no such penalty upon a *bona fide* purchaser as to declare a transfer void as to subsequent creditors."

The obvious answer to this position is, that the statute, section 3440 of the Civil Code, "denounces the transfer as fraudulent and void, as against the claims of a creditor who is such creditor during any of the time that the person who made the transfer remains in possession, after a transfer which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession. Such a transfer being void as to the creditor, he may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor." (*Watson v. Rodgers*, 53 Cal. 401.) The law is so written, and though it may sometimes seem to work a hardship, the courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser, or the good faith of the transaction. (*Woods v. Bugbey*, 29 Cal. 467.)

It results that the judgment should be affirmed, and we so advise.

HAYNES, C., and VANOLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

GAROUTTE, J., HARRISON, J., PATERSON, J.

[No. 14817. Department One. — July 12, 1892.]

ALISO WATER COMPANY, APPELLANT, v. H. G. BAKER ET AL., RESPONDENTS.

EMINENT DOMAIN — CONDEMNATION OF WATER RIGHTS — PLEADING — PUBLIC USE — SUPPLY OF "FARMING NEIGHBORHOOD."—A complaint in an action by a water company to condemn water rights and a strip of land, which alleges that it is necessary to condemn and take the water rights in order to carry out the purpose of the water company to supply a "farming neighborhood," composed of land riparian to the creek, with water for domestic use and irrigation, but which does not otherwise show whether the "farming neighborhood" is inhabited, not only fails to show that the use for which condemnation is sought is a public use, but shows affirmatively that it is not.

ID. — "NEIGHBORHOOD" — CONSTRUCTION OF PLEADING.—The term "neighborhood" is an indefinite phrase, and may consist of but two houses upon a single farm; and as the pleading must be construed most strongly against the pleader, it must be understood that the farming neighborhood to be benefited consists of one farm only, and this the property of the plaintiff.

ID. — UNCERTAIN DESCRIPTION OF RIGHTS TO BE CONDEMNED — SPECIAL DEMURRER.—A complaint in an action to condemn water rights, which describes them generally as all the rights of each of the defendants, whether as riparian owners or acquired by appropriation, adverse use, or prescription, except for domestic use and reasonable irrigation of their riparian lands, is uncertain in not showing definitely what water rights are proposed to be condemned, and is insufficient as against a special demurrer.

APPEAL from a judgment of the Superior Court of Santa Barbara County.

The facts are stated in the opinion.

J. L. Barker, and Thomas McNulta, for Appellant.

Wright & Day, E. W. Squier, and B. F. Thomas, for Respondents.

TEMPLE, C.—This appeal is from a judgment against plaintiff upon demurrer.

The action is to obtain, by condemnation, certain water rights, and a strip of land five feet wide upon a defined line.

It is alleged that plaintiff is a corporation, whose object and purpose is to take water from Sycamore creek and

cañon, and to use and distribute the same in supplying, for domestic use and irrigation, a certain farming neighborhood, composed of land riparian to said creek; that plaintiff is the owner and in possession of certain rights in the waters of Sycamore Creek, said rights being all those rights appertaining to the riparian lands on both sides of said creek, within certain defined limits.

It is also averred that each of the defendants, except Baker, who is said to be a mortgagee of one of the other defendants, owns a tract of land, also riparian, upon both sides of said creek; that to carry out the purpose of the plaintiff to supply said farming neighborhood with water, it is necessary that plaintiff appropriate, condemn, take, and use all the waters of Sycamore Creek, excepting such quantity or portion thereof as the defendants respectively have or may have the right, as riparian owners, to use for domestic purposes, and for irrigation of their lands bordering on and riparian to said creek; that is to say, that it is necessary for plaintiff to have the right to appropriate, condemn, take, and use every right of said defendants respectively in and to all the waters of said creek, whether acquired by appropriation, adverse use and possession, or prescription, as owners of riparian lands. It avers that more water flows in the creek than is necessary for the reasonable and proper use of said defendants as riparian owners for domestic purposes, and the irrigation of said riparian lands; but plaintiff is unable to state the quantity of water which flows in said creek in excess of that which is required by said defendants for domestic purposes, and irrigation as aforesaid, or the quantity that said defendants respectively may be entitled to use as riparian owners for the purposes aforesaid.

The complaint does not show whether the "farming neighborhood," which it is proposed to supply with water, is inhabited, except by the use of the term, and the statement that water is to be supplied for domestic purposes. It does not appear that it is composed of more than one farm, and, in fact, since the pleading must be taken most strongly against the pleader, it must be

understood that there is but one, and that the property of plaintiff, which has certain riparian rights in the stream, and the lands of the farming neighborhood are also said to be riparian.

The term "neighborhood" is an indefinite phrase, and if there are two houses upon plaintiff's farm, it would be proper to call it a neighborhood, though it would not be a public, for whose use property can be condemned. It seems to me, therefore, that the complaint not only fails to show that the use for which it is proposed to condemn the property is a public use, but that it shows affirmatively that it is not.

But this point, although raised by the demurrer, is not urged by respondents here. They submit the appeal upon the proposition that the complaint is uncertain in this, that it cannot be ascertained from it what property the plaintiff seeks to condemn, what water rights it proposes to purchase from the defendants. As shown above, the description is all the rights of each of the defendants, whether as riparian owners or acquired by appropriation, adverse use, or prescription, except for domestic use and reasonable irrigation of their riparian lands. One reason given by appellant's counsel for the generality of the description is, that they cannot know what rights defendants may claim by adverse use or otherwise, and they contend that defendants must describe what they have or claim, and have it valued; and they must necessarily contend further, that defendants would be estopped from hereafter asserting any rights which they neglect to set out. But this proceeding cannot thus be converted into an action to quiet title.

It is an attempt to purchase property against the will of the owners, and for that purpose to have a value placed upon it by the court. There is nothing more obviously essential to plaintiff's case than a sufficient description of that which it proposes thus to acquire. If the defendants make default, the plaintiff must still have a valuation made, and tender the amount to the defendants as a consideration for property acquired

through the proceeding. And the judgment, which cannot include what is not in the pleadings, constitutes its muniment of title. If it has sufficiently described what it wishes to take, it may require the defendants to set out the extent of their interest in that, but plaintiff cannot put upon the defendants the burden of determining what or how much the plaintiff requires to accomplish its purpose. What it seeks here are certain rights in property, and it should specify with exactness what they are.

It appears that plaintiff's land is below the land of the defendants. If it were to divert the water at a point below the defendants' land, the excepted rights, which it does not seek to condemn, would include all riparian rights except water for stock, which is no doubt omitted from the exception by mere oversight.

There would then be nothing to condemn except such rights as were held by adverse use, prescription, or appropriation. And the complaint would contain no attempted description of the property which the plaintiff seeks to purchase.

The diversion contemplated seems to be at a point above the land of defendants, and it is said that the plaintiff proposes to take the riparian right to have water not needed for the excepted uses run idly by. If this were a sufficient description of that right,—and I think it can be easily shown that it is not,—there would be no attempted description of all other rights of the defendants, which nevertheless in such general language the plaintiff seeks to acquire. There is nothing upon which the judgment of the court could be invoked, or a question propounded to a witness as to value.

Conceding that rights not riparian are included in the general description, it cannot be ascertained from the complaint what they are, and as against the special demurrer, the pleading is insufficient.

The defendants' lands are not included within the "farming neighborhood," which it is proposed to supply with water. Whether by such a proceeding as it at-

tempted here water rights could be acquired from one set of riparian owners for the use of another under any possible pleadings, has not been argued and is not passed upon.

I think the judgment should be affirmed.

FOOTE, C., and BELOHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14945. In Bank. — July 12, 1892.]

R. B. WOODWARD, PETITIONER, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.

PARTITION — SEPARATE ACTION FOR DIVISION OF PERSONAL PROPERTY

VOID — ORDER OF JOINT SALE — EXPENSE OF RECEIVER. — Where real estate and personal property thereon respectively are owned by different parties, and are considered and disposed of by the court in two separate and independent actions, one of them being for a partition of the real estate, and the other for a sale of the personal property and a division of the proceeds, the court has no power, in the action for partition of the real estate, to link the two properties together in an order for a joint sale, or by such order to render the owners of the personal property answerable for any part of the expense incurred by a receiver in preserving the real estate, and such order of sale is wholly void.

ID. — ORDER OF SALE VOID UPON ITS FACE — PROHIBITION NOT ALLOWED.

— Where the invalidity of an order of sale of property appears upon its face, a purchaser of the property takes no title, and the owners of the property are therefore not injured by a sale as to warrant the issuance of a writ of prohibition to restrain it.

ID. — RECEIVER IN PARTITION — JURISDICTION — ERROR OF LAW — QUERY.

— Whether the superior court has *power* to appoint a receiver in an action for partition, in the absence of facts of an equitable nature, super-added to the facts justifying partition, or whether the absence of such facts does not affect its jurisdiction to appoint a receiver, discussed but not decided.

APPLICATION to the Supreme Court for a writ of prohibition to the superior court of the city and county of San Francisco. The facts are stated in the opinion of the court.

Wilson & Wilson, and Estee, Wilson & McCutcheon, for Petitioner.

Dunne & McPike, for Respondent.

PATERSON, J.—This is an application for a writ of prohibition commanding the respondent to refrain from further proceedings upon an order which has been made appointing a receiver in the case of *Woodward et al. v. Baum et al.*, and authorizing him to sell an undivided interest in the property.

The petition shows that the petitioner and Mary C. Raum, Helen J. Hutchinson, and Sarah B. Melone, were, on the 11th of February, 1888, the owners of certain real estate in the city of San Francisco, and known as Woodward's Gardens, and that on said day, petitioner, and Mary C. Raum, Ely I. Hutchinson, and Sarah B. Melone, were the owners of the personal property used in connection with said gardens, and consisting of animals, curiosities, pictures, statues, etc.; that on said 11th of February, 1888, petitioner and Sarah B. Melone commenced an action in which they prayed for a partition of said real estate, and if a partition could not be had without great prejudice, then for a sale of the premises, and a division of the proceeds among the parties according to their rights; that thereafter the defendants therein, Mary C. Raum and George E., her husband, Helen J. Hutchinson and Ely, her husband, filed an answer, in which they claimed that partition could be made without prejudice to the owners, and that a sale was unnecessary; that on March 5, 1891, after trial, the court decided that the land could be partitioned without prejudice to the owners, and adjudged that it be divided equally among them; that on September 1, 1888, said Ely Hutchinson and Mary C. Raum commenced an action against the petitioner and Sarah B. Melone for a sale of the personal property above referred to, and a division of the proceeds in accordance with the interests of the parties; that an answer was filed therein by the

defendants, in which they denied that said Ely Hutchinson was the owner of any interest in said personal property, and alleged that the one-fourth interest claimed by him was owned by his wife, said Helen J. Hutchinson; that the latter should be made a party to the action; that there was an action pending, in which the question was involved as to whether all the property, real and personal, should be sold in its entirety, and the proceeds thereof divided among the parties thereto, and that if the personal property should be sold separately from the land comprising Woodward's Gardens, it would bring very little money, whereas, if sold with and as a part of the gardens as a whole, the result would be greatly to the advantage of all the parties interested in the property; that on the fifth day of March the court rendered judgment in that action in favor of the plaintiffs, and decided that said Helen J. Hutchinson was not at the time of the commencement of the action the owner of the personal property, or any part thereof, and that the property was of such a character that partition in specie could not be had, and that it should be sold under the direction of the court, and the proceeds, after deducting expenses, be equally divided among the owners; that on the twenty-third day of May, 1891, the respondent, at the instance of said Sarah B. Melone and her husband, Drury Melone, and against the objections of these petitioners, appointed L. N. Daugherty receiver, with directions to take and keep possession of the property, real and personal; that a receiver was unnecessary, because it was not shown or claimed that said Sarah B. or Drury Melone had been excluded from possession of any of the property, or from any of the proceeds thereof, but that, on the contrary, petitioners had offered in writing to allow said Sarah B. and Drury Melone to take exclusive possession of all the property until final determination of the action, which offer was declined; that on the — day of June, 1891, the court made an interlocutory decree in the action of *Woodward et al. v. Raum et al.*, directing a partition of the property among the

parties according to their respective interests; that on the — day of June, 1891, a final decree was entered in the action of *Hutchinson et al. v. Woodward et al.*, directing that the personal property described in the complaint be sold at public auction, and after payment of the costs, that the proceeds be divided equally among the parties to the action; that thereafter said Sarah B. and Drury Melone moved for a new trial in each of said actions, which motions were denied, and from the orders and the interlocutory decree made in the case of *Woodward et al. v. Baum et al.*, and from the judgment in the case of *Hutchinson et al. v. Woodward et al.*, they appealed to this court; that in November, 1891, the receiver filed an account, showing his receipts and disbursements, to the approval of which petitioners filed objections, on the ground that the order appointing the receiver was in excess of jurisdiction, that the parties to the two actions were not the same, and the court had no power to adjudge that the property involved in one action was liable or chargeable for expenses incurred in preserving the property involved in the other action; and that these objections were overruled, and the court upon the evidence introduced ordered that the account stand approved; that on the nineteenth day of December, 1891, the court, against the objections of petitioners, made an order authorizing the receiver to borrow the sum of \$494.64, the amount of indebtedness which he had incurred in caring for the property, and to issue therefor his certificate; that thereafter the receiver filed a second account, showing that the balance due him was the sum of \$877.15, and this account was approved; that on the fourteenth day of January the receiver represented to the court that he had been unable to raise any money on the certificates authorized by the court, and that it was necessary to sell an undivided interest in all of the property to raise funds for the payment of expenses; that on the eighteenth day of January, 1891, the court, against the objection of petitioners, made an order authorizing the receiver to sell at public sale to the highest bidder for cash the

smallest undivided interest in the real and personal property that would realize, besides expenses of sale, the sum of \$8,591.71, and to give his certificate therefor.

It is claimed that the order appointing the receiver, and the orders settling and allowing the receiver's account, and directing him to sell an undivided interest in the property, are all in excess of the jurisdiction of the superior court.

1. The superior court has *jurisdiction* to appoint a receiver in an action of partition. Section 564 of the Code of Civil Procedure provides that a receiver may be appointed by the court,—“6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.” The action of partition, “though regulated to a great extent by the statute, partakes more fully, both in respect to the remedies provided and the mode of procedure, of the principles and rules of equity than those of law” (*Gates v. Salmon*, 35 Cal. 593; 95 Am. Dec. 139; *Emeric v. Alvarado*, 90 Cal. 456); and whenever it appears necessary to protect the interests of all the parties during the prosecution of an action for partition, the court will, upon proper application, appoint a receiver. (17 Am. & Eng. Ency. of Law, 764; Beach on Receivers, sec. 492; *Goodale v. Fifteenth District Court*, 56 Cal. 29.)

It is claimed by the petitioners that no sufficient showing was made in the court below for the appointment of a receiver; but we think this is a matter which cannot be considered in this proceeding. The court had jurisdiction of the subject-matter and of the parties. It had the *power*, therefore, to hear and determine a motion for the appointment of a receiver, and its action thereon cannot be regarded as in excess of its jurisdiction. If error was committed, the law has provided an ample remedy. (*Wreden v. Superior Court*, 55 Cal. 504; *Clark v. Superior Court*, 55 Cal. 199; *More v. Superior Court*, 64 Cal. 346.) Where the petitioner “has a speedy and adequate remedy in due course of law, the writ cannot issue.”

(*Murphy v. Superior Court*, 84 Cal. 596; High on Extraordinary Remedies, sec. 772.)

2. The order of sale is clearly void. The court had no power in the case of *Woodward et al. v. Baum et al.* to direct the sale of property involved in the case of *Hutchinson et al. v. Woodward et al.* The real estate and personal property respectively are owned by different parties, and were considered and disposed of by the court in two independent actions. The burden of maintaining the personal property cannot be put upon the owners of the real estate, nor could the court link the two properties together, and render the owners of the personal property answerable for any part of the expense incurred in preserving the real estate. If Mr. Hutchinson succeeded to the rights of his wife in the personal property,—and the court found that he did,—it needs no argument to show that no order could be made charging his property with the expenses incurred by the receiver in caring for property involved in another action to which he was not a party, and in which he had no interest. But the invalidity of the order of sale appears upon the face of the proceedings. The petitioners cannot, therefore, be injured by a sale. A purchaser would take no title, and could be treated as a trespasser. This being so, no case is made for the issuance of a writ of prohibition. (*Ex parte Braudlacht*, 2 Hill, 369; 38 Am. Dec. 593.)

The application is denied, and the writ is discharged.

GAROUTTE, J., concurred.

DE HAVEN, J., concurring.—We concur in the judgment upon the ground last discussed in the opinion of Mr. Justice Paterson. As to the other point relating to the question of the jurisdiction of the superior court to appoint a receiver of the property in the actions referred to, we express no opinion.

BEATTY, C. J., dissenting.—I dissent. In my opinion the writ of prohibition should be made peremptory. A sale of property under an order of court void on its face

will, of course, confer no title upon the purchaser, and there are remedies by which the owners may ultimately secure a judicial determination of the invalidity of the purchaser's claim, but in the mean time the marketable value of the property is impaired, if not destroyed, and this injury can be prevented in no other way than by prohibition. No other remedy is fully adequate to prevent injury.

But aside from this, I think the order appointing a receiver of the real property was an excess of jurisdiction.

The superior court has no power to appoint a receiver, except as authorized by the statute, and the only authority claimed for the court in this case is subdivision 6 of section 564 of the Code of Civil Procedure, which reads as follows: "In all other cases where receivers have heretofore been appointed by the usages of courts of equity." There has never been any usage of courts of equity to appoint receivers in actions for the partition of lands between co-tenants, unless, superadded to the facts justifying a partition, there were other facts of an equitable nature rendering such appointment necessary. In this case the petition shows affirmatively that no such facts existed in the action to partition the realty, and consequently there was no case for the appointment of a receiver of the realty. Without a case the power does not exist.

The decision in *Goodale v. District Court*, 56 Cal. 26, is entirely consistent with these views.

[Nos. 18333, 14453. In Bank. — July 12, 1892.]

GEORGE J. SMITH, RESPONDENT, v. W. FRANK WHITTIER ET AL., APPELLANTS.

STIPULATION OF ATTORNEYS — CONSTRUCTION OF CODE — WRITTEN AGREEMENT NOT FILED NOR ENTERED UPON MINUTES. — Section 283 of the Code of Civil Procedure, which provides that an attorney can bind his client in an action, by his agreement, "filed with the clerk, or entered upon the minutes of the court, and not otherwise," was not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise, and does not require a construction, that in no instance shall an agreement which the attorney may make in behalf of his client be binding, unless entered in the minutes of the court, or filed with the clerk. Its provisions refer to executory agreements, and not to those which have been wholly or in part executed.

ID. — STIPULATION ACTED UPON WITHOUT FILING — ESTOPPEL. — If the attorneys in an action have acted upon a written agreement, to such an extent that it would be inequitable not to recognize its binding effect, the court will not allow the agreement to be repudiated, upon the ground that it has not been filed with the clerk.

ID. — EFFECT OF SUBSTITUTION OF ATTORNEYS — CONTINUING FORCE OF STIPULATION. — The parties to an action cannot be relieved from an obligation created by their attorneys, by the mere fact that another attorney is substituted in the place of the former attorneys who created the obligation. An attorney who is substituted for another in a cause steps into the place of his predecessor, and stands, with reference to the case and to the other party, precisely as did his predecessor, and can repudiate or be relieved from an agreement that had been made by him, only to the same extent and in the same manner as could his predecessor.

ID. — STIPULATION AS TO TESTIMONY — CONTINUING CONSENT — DEATH OF WITNESS — IRREVOCABLE AGREEMENT — EFFECT OF SUBSEQUENT FILING. — The execution of a stipulation between the attorneys of the parties to a cause, that the testimony of a witness taken in another action should be read and used in the trial of the cause in which the stipulation was entered into, is a continuing consent on the part of the attorneys that the stipulation may be filed at any time thereafter, unless they in some direct and express mode signify their withdrawal of such consent and the death of the witness before such withdrawal renders the stipulation irrevocable; and the filing of the stipulation thereafter has the effect to operate and become binding upon the parties as from its date.

NEGLIGENCE — FALLING OF ELEVATOR — EVIDENCE — INSTRUCTIONS FROM BUILDERS OF ELEVATOR TO OWNERS. — In an action for injuries caused by the falling of an elevator, where the main issue is whether the defendants had been negligent in the mode in which they had run the elevator at the time of the accident, testimony as to directions given to one of the defendants, from those who put the elevator in the building, as to how the elevator should be handled or used, and as to what the effect

would be if he did not carry out those instructions, is relevant, material, and competent upon the issue of negligence.

ID. — NEGLIGENCE RELATIVE TO CIRCUMSTANCES — SITUATION AND KNOWLEDGE OF PARTIES. — Negligence is opposed to diligence or carefulness, and is never absolute or intrinsic, but is always relative to some circumstance of time, place, or person, and is to be determined by reference to the situation and knowledge of the parties, and all the attendant circumstances; and what would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances.

ID. — KNOWLEDGE OF FACTS SHOWING DUTY — CARE IN CONTROL OF SUPERIOR FORCE. — Negligence being the violation or disregard of some duty or obligation which one owes to another, a knowledge of the facts out of which the duty springs is an essential element in determining whether there has been any negligence; and the amount of care requisite to be exercised in the use of a mechanical or natural agency, whose superior force demands skill in its management to prevent its getting beyond ordinary control, depends upon the extent to which the knowledge goes.

ID. — EVIDENCE OF NOTICE — TESTIMONY OF DEFENDANT — CROSS-EXAMINATION OF INFORMANT — HEARSAY. — Whenever the knowledge of a defendant charged with negligence is a factor in determining the question of negligence, it may be shown by his own testimony that he received notice of facts which would constitute negligence, and it is no objection that the notice was not given under the sanction of an oath, or that the opposite party had no opportunity of cross-examining the informant, and proof of such notice is not within the rule excluding hearsay.

EVIDENCE — DECLARATIONS — HEARSAY. — Where the fact sought to be established is, that certain words were spoken, without reference to the truth or falsity of the words, whether by a party to the action as an admission of a fact, or to him as a notice, or under such circumstances as to require action or reply from him, the testimony of any person who heard the statement is original evidence, and not hearsay.

NEW TRIAL — MISCONDUCT OF JURY — COUNTER-AFFIDAVITS — EXCUSABLE NEGLIGENCE — DISCRETION. — Where one of the grounds of a motion for a new trial is misconduct of the jury, and counter-affidavits directly responsive to the affidavits in support of the motion are prepared, but by inadvertence and excusable neglect are not filed until more than ten days thereafter, it is within the discretion of the court to permit such counter-affidavits to be read, upon a proper showing of excusable neglect.

ID. — TIME FOR COUNTER-AFFIDAVITS NOT JURISDICTIONAL. — The time within which counter-affidavits on a motion for a new trial may be filed is not jurisdictional, but is only a rule of procedure subject to the equitable control of the court.

RULES OF PROCEDURE — OBJECT AND CONSTRUCTION. — Rules of procedure, whether statutory or made by the court, are intended to facilitate courts in doing justice between the parties, and when not jurisdictional are intended for the convenience of courts and litigants, and should be liberally construed.

EVIDENCE — ADMISSION — WILLINGNESS TO SETTLE — OFFER OF COMPROMISE. — The statement of a party against whom a claim is made, that he

is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest. The rule which excludes offers of compromise does not apply to statements made by a party which are in no wise connected with any attempt at a compromise whether made to a stranger or to a co-defendant.

VERDICT — DAMAGES NOT EXCESSIVE. — A verdict for thirty thousand dollars damages held not excessive under the facts of this case.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court in this case, and in the case of *Treadwell v. Whittier*, 81 Cal. 574.

D. M. Delmas, for Appellants.

It was error to allow the deposition of Bangs to be read in evidence, as a client is not bound by a stipulation filed after the attorney who has signed it has ceased to be his attorney, for the stipulation, to be binding upon the client, must be both signed and filed while the attorney is still acting as such. (Code Civ. Proc., sec. 283, subd. 1; *Borkheim v. N. B. & M. Co.*, 38 Cal. 623; *Merritt v. Wilcox*, 52 Cal. 238; *Simpson v. Budd*, 91 Cal. 488.) It was error to permit the witness Ravekes to testify to the directions which had been given as to the running of the elevator, as the evidence was irrelevant and immaterial, and was incompetent as hearsay. (*Howard v. Savannah etc. R'y Co.*, 84 Ga. 711; *Fisher v. Southern Pacific R. R. Co.*, 89 Cal. 399.) The court erred in admitting the declarations or testimony of Ravekes as to the settlement of the case. (*Dennis v. Belt*, 30 Cal. 247; *Duff v. Duff*, 71 Cal. 513; *Gommersall v. Crew*, 10 N. Y. Sup. Ct. 231; 2 Wharton on Evidence, sec. 1090; *Marsh v. Gold*, 2 Pick. 285; *Gerrish v. Sweetser*, 4 Pick. 374.) It was error for the court to permit counter-affidavits to be filed and read to the defendant's affidavit on motion for a new trial, as they were not filed or served within ten days after the filing and service of the moving affidavits. The court had no power to extend the ten-day

limit. (Code Civ. Proc., secs. 659, 1054.) It was no more in the power of the court to permit those affidavits to be filed after the ten days had expired than it would be in the power of the court to permit notice of motion for new trial to be filed ten days after the time that it should be filed, or a notice of appeal from the judgment after a year has expired. (*Roush v. Van Hagen*, 17 Cal. 121; *Hayne on New Trial and Appeal*, sec. 13; *Clark v. Crane*, 57 Cal. 632; *Leech v. West*, 2 Cal. 98; *Hegeler v. Henckell*, 27 Cal. 494.) The powers granted to the court to relieve parties from their mistake or excusable negligence do not extend to cases of this character, as will be seen by reference to section 473 of the Code of Civil Procedure. Where, as in the case at bar, the conduct of the defendant has not justified the awarding of punitive damages, the damages are excessive if more than actually compensatory. (*Union Pac. R. R. Co. v. Milliken*, 8 Kan. 647.) For the purpose of reviewing verdicts and obtaining a practical estimate of the amount of damages actually awarded, courts have frequently compared the earning capacity of the person injured with the amount of an annuity which the damages would purchase; and when the two amounts have been found to be notably disproportionate, the verdict has been set aside as excessive. (*Houston R. R. Co. v. Willie*, 53 Tex. 318; 37 Am. Rep. 756; *Chicago R. R. Co. v. Jackson*, 55 Ill. 497; 8 Am. Rep. 661; *Chicago v. Hughes*, 87 Ill. 94; *Union Pac. R. R. Co. v. Milliken*, 8 Kan. 647; *Cook v. Clay St. R. R.*, 60 Cal. 604.) But it is further submitted that a comparison of the verdict herein with verdicts awarded by other juries in similar cases will afford us the most reliable test, because, by ascertaining what has been the result of the average good sense of other jurymen, we may arrive at some estimate of what ought in this case to have been the result had this jury relied solely on its good sense and sound discretion. (*Jennings v. Van Schaick*, 13 Daly, 7; *Louisville etc. R. R. Co. v. Fox*, 11 Bush, 495.) Accordingly, it is submitted that the following table, showing the verdicts

awarded by other juries similarly situated, furnishes a standard of average reason, discretion, and judgment, by means of which this court may test the verdict herein without substituting its own reason or discretion for that of the jury; \$2,000, *Waldron v. St. Paul*, 33 Minn. 87; \$3,500, *Klutts v. Railroad Co.*, 75 Mo. 642; \$4,000, *Hanson v. Railroad Co.*, 62 Me. 84; \$5,000, *Chicago v. Langlass*, 66 Ill. 361; \$5,000, *Chicago v. Mumford*, 97 Ill. 560; \$5,000, *Wardle v. Railroad Co.*, 35 La. Ann. 202; \$7,500, *Chicago v. Herz*, 87 Ill. 541; \$8,000, *Draper v. Baker*, 61 Wis. 450; 50 Am. Rep. 143; \$8,958, *Illinois Cent. R. R. v. Parks*, 88 Ill. 373; \$10,000, *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; 52 Am. Rep. 653; \$10,000, *Dælzell v. Long Island R. R.*, 53 Hun. 633; \$8,527, *Stouter v. Manhattan R. R.*, 6 N. Y. Sup. Ct. 163; \$9,500, *Knapp v. Sioux etc. R. R. Co.*, 71 Iowa, 41; \$5,000, *Texas Pac. R'y v. Davidson*, 68 Tex. 370; \$10,000, *Osborn v. City of Detroit*, 32 Fed. Rep. 36; \$8,000, *Cummings v. Nat. Furnace Co.*, 60 Wis. 603; \$8,000, *Atchison R. R. v. Moore*, 31 Kan. 197; \$7,000, *Wedekind v. Southern Pacific R'y Co.*, 20 Nev. 292; \$9,000, *Griffith v. Missouri Pacific R. R.*, 98 Mo. 168; \$6,000, *East St. Louis R. R. v. Frazier*, 26 Ill. App. 437; \$6,500, *Dallas etc. R'y v. Able*, 72 Tex. 150; \$4,000, *Missouri Pacific R'y Co. v. Shuford*, 72 Tex. 165; \$20,000, *Walker v. Erie R'y Co.*, 63 Barb. 260; \$16,500, *Boyce v. California Stage Co.*, 25 Cal. 460; \$25,000, *Ehrgott v. Mayor*, 96 N. Y. 266; 48 Am. Rep. 622; \$10,000, *Belair v. Chicago etc. R. R.*, 43 Iowa, 662; \$9,000, *Deppe v. Chicago etc. R. R.*, 38 Iowa, 592; \$8,000, *Otis v. Cowles*, 7 N. Y. Sup. Ct. 251; \$12,000, *Texas R'y v. Douglass*, 13 Tex. 325; \$15,000, *Solen v. V. & T. R'y*, 13 Nev. 137; \$8,250, *Reed v. Chicago*, 74 Iowa, 188; \$10,000, *Columbia R. R. Co. v. Hawthorn*, 3 Wash. Ter. 353; \$7,000, *Marion v. Railroad Co.*, 64 Iowa, 568. In the following cases, the courts have considered the damages awarded to be sufficient evidence of the existence of passion or prejudice in the minds of the jury: \$9,250, *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724; \$24,000, *Pence v. Railroad*, 79 Iowa, 389;

\$30,000, *Heddles v. Chicago etc. R. R. Co.*, 74 Wis. 239;
\$35,000, *Louisville etc. R. R. Co. v. Fox*, 11 Bush, 495;
\$15,000, *Collins v. Council Bluffs*, 32 Iowa, 432.

Lloyd & Wood, Lloyd, Newlands & Wood, and Garber & Bishop, for Respondent.

The counter-affidavits were filed in time. The order of the court extending the time was of itself legal and sufficient, upon any fair and proper construction of the code. Further, if this were otherwise, the court, on the showing made, properly granted the motion. And even unopposed by the counter-affidavits, the showing was insufficient. (See *Spottiswood v. Weir*, 80 Cal. 488.) The verdict was not excessive, should not have been set aside by the trial court, and cannot, on that ground, be here set aside. In the following cases large verdicts were upheld: \$14,000, *Gale v. N. Y. Cent. R. R.*, 13 Hun, 1; \$24,500, *Sloan v. N. Y. Cent. R. R.*, 1. Hun, 540; \$22,250, *Shaw v. Boston etc.*, 8 Gray, 45, 85; \$30,000, *Harold v. N. Y. etc.*, 24 Hun, 186, aff'd 89 N. Y. 628; \$25,000, *Alberti v. N. Y. etc. R. R.*, 43 Hun, 422; \$25,000, *Chapin v. New Orleans etc.*, 17 La. Ann. 19; \$25,000, *Chicago etc. R. R. Co. v. Holland*, 18 Bradw. 418; \$11,000, *Jordan v. N. Y. etc. R. R.*, 9 N. Y. Sup. Ct. 506; \$20,000, *International etc. v. Brazzil*, 78 Tex. 314; \$18,000, *Murray v. Brooklyn R. R.*, 7 N. Y. Sup. Ct. 900; \$24,000, *Pence v. Chicago etc. R. R.*, 79 Iowa, 389; \$9,500, *Knapp v. Sioux etc. R. R.*, 71 Iowa, 43; \$21,000, *Caldwell v. N. J. etc. R. R.*, 47 N. Y. 297; \$10,000, *Robinson v. C. P. R. R.*, 48 Cal. 410; \$45,000, *Pym v. Great Northern etc.*, 110 Eng. Com. L. 759; \$40,133, *Hall v. Chicago*, 46 Minn. 439; \$25,000, *Ehrmann v. Brooklyn*, 14 N. Y. Sup. Ct. 336; \$25,000, *McMarshall v. Chicago*, 80 Iowa, 757; 20 Am. St. Rep. 445; \$16,000, *C. & A. R. R. v. Fisher*, 38 Ill. App. 33. It must be a glaring case indeed of outrageous damages, and all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages. (*Huckle v. Money*, 2 Wils. 205. See also *Solen v. Virginia and Truckee*, 13 Nev. 138; *Louisville etc. R. R. Co. v.*

Thompson, 64 Miss. 584; *Groves v. City*, 39 Hun, 11; *Ransom v. N. Y. etc.*, 15 N. Y. 416, decided in 1857, and sustaining a verdict of fourteen thousand dollars. Under our statute the verdict cannot be set aside as excessive. The amount is not so wholly disproportioned to the wrong and injury as to be susceptible of no other interpretation than that it was arrived at through passion, prejudice, etc. (*Phelps v. Cogswell*, 70 Cal. 202; *M. K. etc. R. R. Co. v. Weaver*, 16 Kan. 456, 465, 466. See *Goddard v. Grand Trunk*, 57 Me. 226, 227; 2 Am. Rep. 39; *Wabash etc. R. R. Co. v. Peyton*, 106 Ill. 539; 46 Am. Rep. 705.) Merely as samples of the infinite number of cases where verdicts larger than this have been sustained,—that is, larger when the relative amount of injury and suffering, etc., is compared and considered,—we may cite: *Ketchum v. Railroad*, 38 La. Ann. 778, 779; *Sobieski v. St. Paul*, 41 Minn. 169; *Western Union Telegraph v. Simpson*, 73 Tex. 422; *Neilon v. Marinette*, 75 Wis. 579; *Akersloot v. Second Ave.*, 15 N. Y. Sup. Ct. 864; 8 N. Y. Sup. Ct. 926; *Croker v. Chicago*, 36 Wis. 678; *Howard Oil Co. v. Davis*, 76 Tex. 630; *Murtaugh v. New York*, 49 Hun, 458; *Furness v. Railroad*, 102 Mo. 438; 22 Am. St. Rep. 781; *Furness v. Railroad*, 102 Mo. 669; 22 Am. St. Rep. 800. If any one could say that any rational man of character would not, for the amount awarded, be put in the defendant's position, the damages are not excessive. (*Hallett v. Crutchley*, 5 Taunt. 277; 3 Sedgwick on Measure of Damages, 8th ed., sec. 1320; 16 Am. & Eng. Ency. of Law, 585.) That the evidence in this case warranted the jury in allowing large and substantial damages for loss of time, earning capacity, etc., in addition to full compensation for pain, mental anguish, expenses, bodily injury, etc., we cite: *Fisher v. Jansen*, 128 Ill. 549; 30 Ill. App. 91; 1 Sedgwick on Measure of Damages, 8th ed., 262; *Feeney v. Long Island R. R. Co.*, 116 N. Y. 375; *Chicago v. Barnes*, 28 N. E. Rep. 328; *Lincoln v. Schenectady*, 23 Wend. 430; *Railroad v. Barron*, 5 Wall. 104; *City of Panama*, 101 U. S. 453; *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175, and cases cited by court and

counsel; *Chicago v. Hastings*, 26 N. E. Rep. 594; *Stockton v. Chicago*, 26 N. E. Rep. 1095; *Head v. Hargrave*, 105 U. S. 45; *Vicksburg R. R. Co. v. Putnam*, 118 U. S. 554, and cases cited; *Ballou v. Farnum*, 11 Allen, 73; *McMahon v. North etc. R. R. Co.*, 39 Md. 441.

HARRISON, J.—Action to recover damages for personal injuries caused by the falling of an elevator. The facts out of which the cause of action arose are the same as those which were presented in the cases of *Treadwell* against the same defendants, reported in 80 Cal. 574, the plaintiff and *Treadwell* having both been passengers on the elevator at the time of the accident. A verdict was rendered in favor of the plaintiff for \$30,000, and from the judgment entered thereon, and also from the order of the court denying a new trial, the defendants have appealed to this court.

1. The case of *Treadwell* was tried in April, 1883, and a verdict rendered in favor of the plaintiff. While the cause was pending in the superior court on a motion for a new trial, the attorneys for the parties to the present action, who were also the attorneys for the respective parties in the *Treadwell* case, entered into the following stipulation:—

“Stipulated that the testimony of D. A. Bangs, as given and taken down by the phonographic reporter on the trial of the case of *John Treadwell* against said defendants, *W. F. Whittier et al.*, when written out in long-hand, and certified as correct by said reporter, may be read and used in the trial, or in any proceedings in the said case of *George J. Smith v. W. F. Whittier et al.*, with like force and effect as if said Bangs was on the stand and testifying in open court, subject only to such objections or exceptions as might be made if said Bangs was testifying in open court in said last-named cause, and also subject to the right of defendants’ attorneys to contradict or impeach said Bangs on any matter testified to by him, without first calling his attention

thereto, or making preliminary proof as to such contradictory matter.

"San Francisco, November 1, 1884.

"McALLISTER & BERGIN,

"Attorneys for Defendants.

"LLOYD & WOOD,

"Attorneys for Plaintiff."

Before the trial of the present case, the witness Bangs left the state and died; and on the second day of the trial the plaintiff offered to read his testimony in the former case, under the foregoing stipulation. To this the defendants objected, upon the ground that the stipulation had not been filed with the clerk until after McAllister & Bergin had ceased to be the attorneys for the defendants, and therefore was not binding upon the defendants. Mr. Delmas had become the attorney for the defendants in place of McAllister & Bergin prior to the commencement of the trial, but his substitution as such attorney was not made a matter of record until after the trial had begun, and on the same day, about two hours after the filing of the order of substitution, the plaintiff caused the foregoing stipulation to be filed with the clerk.

Section 283 of the Code of Civil Procedure provides: "An attorney and counselor shall have authority,—
1. To bind his client in any of the steps of an action or proceeding by his agreement, filed with the clerk, or entered upon the minutes of the court, and not otherwise."

The evident object of this section is that whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record,—if oral, that it shall be entered in the minutes, and if written, that it shall be filed with the clerk. "It is not intended to enlarge or abridge the authority of the attorney, but only to pre-

scribe the manner of its exercise." (*Preston v. Hill*, 50 Cal. 53; 19 Am. Rep. 647.) The section does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding, unless entered in the minutes of the court or filed with the clerk. Its provisions have reference to executory agreements, and not to those which have been wholly or in part executed; and it was with reference to oral agreements of an executory character that the court said in its opinion in *Borkheim v. B. & M. Ins. Co.*, 88 Cal. 628, "of such agreements, therefore, there can be no *specific performance*." If under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement, upon the ground that it had not been entered in the minutes of the court. (*Himmelmann v. Sullivan*, 40 Cal. 125; *Hawes v. Clark*, 84 Cal. 272; *People v. Stephens*, 52 N. Y. 306.) If the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court. (*Patterson v. Ely*, 19 Cal. 36; *Reese v. Mahoney*, 21 Cal. 306.) If, however, the terms of the verbal agreement are disputed, courts refuse to settle such disputes, or to try a collateral issue for the purpose of determining whether any agreement had been made. In *Patterson v. Ely*, 19 Cal. 36, the verbal agreement was not entered of record until after the trial had begun, and in *Hawes v. Clark*, 84 Cal. 272, although the minutes contained no record of the agreement, the court nevertheless enforced it, notwithstanding the objection upon that ground. The same principles are applicable to the enforcement of a written agreement which has not been filed as to a verbal one which has not been entered in the minutes of the court. If the parties have acted upon such written agreement to such an extent that it would be inequitable not to

recognize its binding effect, as, for example, if a party has obtained under the agreement that in consideration of which the other became bound thereby, or has been relieved of some burden which was the consideration for which it was given, or if the other party has been reasonably led thereby to forego any step which but for the agreement he would have taken, courts will not allow the agreement to be repudiated upon the ground that it had not been filed with the clerk.

The stipulation in the present case was one which was within the authority of McAllister & Bergin, as attorneys for the defendants, to make. It pertained to the conduct of the suit for which they had been employed, and when made, was binding upon the defendants, and remained binding upon them until they should be relieved therefrom. They were not relieved from the obligation created by it by the mere fact that Mr. Delmas had been substituted as their attorney in the place of McAllister & Bergin. An attorney who is substituted for another in a cause has no greater rights than his predecessor, nor is his client's position in the case in any way changed by such substitution. He steps into the place of his predecessor, and stands, with reference to the case and to the other party, precisely as did his predecessor, and can repudiate or be relieved from an agreement that had been made by him only to the same extent and in the same manner as could his predecessor.

The natural effect of this agreement was to induce the plaintiff to forego the taking of the deposition of Bangs, and the agreement itself, in the absence of any showing in reference thereto, may from its terms be regarded as having been entered into for the mutual benefit and convenience of both parties, inasmuch as Bangs had been fully examined and cross-examined in the trial of the Treadwell case by the same attorneys for the respective parties, and each was by this agreement relieved of the labor and time that would have been required

in taking his deposition for the purpose of re-examining him upon the same subject.

It was not necessary that the agreement should have been filed by the plaintiff immediately upon its execution, under the penalty of not being able to avail himself of it. Its execution by McAllister & Bergin was a continuing consent on their part that it might be filed at any time thereafter, unless they should in some direct and express mode signify their withdrawal of such consent, and upon the death of Bangs before such consent was withdrawn, the position of the plaintiff in reference to having his testimony for use at the trial of the present case became so changed that thereafter the agreement could not have been revoked, or the consent of the attorneys to its filing withdrawn. When it was afterwards filed, the effect of such filing operated and became binding upon the defendants as from its date.

2. At the trial, the defendant Ravekes was called as a witness on behalf of the plaintiff, and was asked whether he had received any direction from those who put the elevator in the building as to how it should be handled or used, and whether anything was said as to what the effect would be if he did not carry out those instructions; and answered that he had received from them instructions to start slowly at first, and always when reaching either floor at which to leave the elevator, to decrease the speed by shutting off the water, and never allow the elevator to stop of its own accord; that otherwise the effect would be to break a portion of the machinery in the basement. These questions were objected to by the defendants, upon the ground that they were "irrelevant and immaterial," and the overruling of their objection is assigned as error. The argument of the appellants upon this assignment is, however, mainly upon the ground that the evidence was *incompetent*, for the reason that it was hearsay.

The evidence given by the witness in answer to the questions was both relevant and material. The main issue between the parties to the action was whether the

defendants had been negligent in the mode in which they had run the elevator at the time of the accident, and upon that issue the plaintiff had the right to introduce any competent evidence that would tend to establish such negligence. Negligence is opposed to diligence or carefulness, and is never absolute or intrinsic, but is always relative to some circumstance of time, place, or person. The definition which is most frequently given is that formulated by Baron Alderson in *Blyth v. Birmingham Water Works Co.*, 11 Exch. 784, as "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do." "It must be determined in all cases by reference to the situation and knowledge of the parties, and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances." (*Nitro-Glycerine Case*, 15 Wall. 536.) The Civil Code, section 1714, makes every one responsible "for an injury occasioned to another by his want of ordinary care or skill in the management of his property"; and "ordinary care" is that which every person of ordinary prudence takes of his own concerns, or would employ under similar circumstances. In *Hoffman v. Toulumne Co. Water Co.*, 10 Cal. 413, the test is stated to be, "what discreet and prudent men should do, or ordinarily do, in such cases, where their own interests are to be affected, and all the risk their own."

As negligence is the violation or disregard of some duty or obligation which one owes to another, it is evident that a knowledge of the facts out of which the duty springs is an essential element in determining whether there has been any negligence. In certain relations, such knowledge is conclusively presumed, while in others it devolves upon the party charging the negligence to show that the knowledge existed. Especially is such

knowledge an element in determining the care to be exercised in the use of some mechanical or natural agency, whose superior force demands skill in its management, to prevent its getting beyond ordinary control. The amount of care requisite in such a case depends upon the extent to which the knowledge goes. The mode in which an appliance involving such agency is to be used is as material as the manner in which it is constructed, and if one mode of its use is free from danger and another not, it is relevant and material to show whether the defendant knew how to use that mode which was free from danger, since his knowledge of the proper mode, and his failure to exercise it, would be evidence of negligence. "Facts which were known to him, or by the use of proper diligence would have been known to a prudent man in his place, come into account as part of the circumstances." (Pollock on Torts, 356.) In the case of *Hoffman v. Tuolumne Co. Water Co.*, 10 Cal. 413, it was held that the knowledge of the defendants respecting the character of the ground upon which the dam was constructed was an element to be considered in determining whether they had been guilty of negligence in constructing it; and the nitro-glycerine case went upon the proposition that the defendants were ignorant of the proper mode of handling the article. The negligence of the master in the retention of an incompetent servant, or in the use of defective machinery, is frequently shown by evidence that he had been informed of previous negligent acts on the part of the servant, or of the defects in the machinery. (*Malone v. Hawley*, 46 Cal. 409.) The negligence of the servant, or the defects in the machinery, must still be shown in the particular case, but the presumption that the master has fulfilled his obligation to select competent servants, or provide suitable machinery, is overcome by proof that such information had been communicated to him. Whenever the knowledge or information of the party charged to have been negligent is a factor in determining such question, it is proper, for the purpose of showing such knowledge or

information, to show that notice was given to him, and that he was informed of the facts which would constitute negligence; and there is no better mode of showing this than by the evidence of the party himself that he had received the information. Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath, or that the opposite party had no opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but upon the theory that the information was correct, the plaintiff, in the present instance, had the right to show that the defendants had received such information, and thus obviate any claim that might be made by them that they had exonerated themselves from liability by procuring the elevator to be constructed by a competent and reputable manufacturer.

The evidence thus introduced was not, moreover, within the rule which excludes hearsay. Hearsay is a species of derivative evidence which is offered for the purpose of establishing some specific fact in a case, and rests on the veracity and competency of some other person than the witness. Such testimony is excluded whenever it appears that a higher degree of evidence of that fact can be obtained by the production of the person from whom the evidence offered was derived; but whenever the testimony of such person is of no higher degree in establishing the fact to be shown than the evidence offered, either is original and primary evidence of that fact. If the fact sought to be established is, that certain words were spoken, without reference to the truth or falsity of the words, as, for instance, that a certain statement was made by a party to the action as an admission of a fact, or was made to him as a notice, or under such circumstances as to require action or reply from him, the testimony of any person who heard the statement is original evidence, and not hearsay. (Wharton on Evidence, sec.

ascertain the actual facts in a cause. For the guidance of parties, certain formalities are required, and certain times specified within which the several steps are to be taken; but, except in matters which are jurisdictional, these provisions are intended for the convenience of courts and litigants, and should be liberally construed.

4. Upon the cross-examination of the defendant Ravkes, the defendants endeavored to show that he had taken no part in the defense of the present action; and upon his re-direct examination, he was asked whether he had not advocated with his firm a settlement of the case, to which the defendants objected, upon the ground that it was "incompetent and irrelevant," but did not specify the grounds upon which they claimed it to be incompetent. The court overruled their objection, and it is now contended by them that in this ruling the court violated the rule which precludes a party from giving evidence relative to offers for a compromise which have been rejected. In the present case, however, there was no treaty for a compromise depending between the parties, and the testimony introduced did not relate to the offer of any terms of compromise, or to any dealing with the adverse party upon the subject of a compromise; and the rule which excludes offers made for the purpose of settlement is inapplicable.

The statement of a party against whom a claim is made, that he is willing to settle the claim, is a declaration by him against his interest, sometimes called a self-disserving or self-harming statement; and section 1870 of the Code of Civil Procedure provides that upon the trial of a cause, evidence may be given of,—“2. The act, declaration, or omission of a party, as evidence against such party.” Such declarations are classed in books on evidence under the head of Admissions. Mr. Stephen, in his treatise on Evidence, defines an admission to be, “a statement, oral or written, suggesting any inference as to any fact in issue, or relevant, or deemed to be relevant, to any such fact made by or on behalf of any party to any proceeding.” Within this definition, the testi-

mony sought from the witness Ravekes was admissible. Such a declaration, in the absence of any other evidence than that he made it, would justify a jury in drawing the inference that he considered himself liable for the claim, since ordinarily men are willing to settle only those claims for which they are liable, and consequently the statement is admissible upon the same principles as would be his direct statement that he was liable for the claim. The making of such admission is a fact which is relevant to the issue upon his liability. Proof of making the admission is not, however, proof of the fact of his liability, but is only evidence in support of proving that fact; and the weight of such evidence, as well as its sufficiency for authorizing such inference, must be determined by the jury. The declaration may have so little weight in itself that the jury would not regard it as entitled to any consideration; and the party making the declaration may countervail its entire weight and sufficiency by showing the circumstances under which it was made, or the purpose for which he made it, as, for example, that he made it under a misapprehension of the facts, or with a view to a speedy determination of the controversy, or out of a charitable regard for the claimant; but the declaration itself is admissible, upon the ground that the facts implied therein are relevant to the issue in the case. Admissions are generally regarded as weak evidence for the proof of a fact, and are never conclusive of the facts stated, or of the inference to be drawn therefrom; and our statute requires the jury to be instructed, on all proper occasions, "that the evidence of the oral admissions of a party ought to be viewed with caution." (Code Civ. Proc., sec. 2061, subd. 4.) An exception to the admissibility of such admissions exists when they are made by way of an offer to buy peace, or with reference to negotiations with the adverse party for a compromise of the dispute. Under such circumstances, except as they are admissions of distinct facts, they are regarded as hypothetical admissions, from which it is not proper to draw any inference of liability, and there-

fore are not to be received in evidence. The rule, however, which excludes offers made for the purpose of a compromise, does not apply to statements made by a party which are in no wise connected with any attempt at a compromise, whether these statements are made to a stranger or to his co-defendant. (*West v. Smith*, 101 U. S. 273; *Ashlock v. Linder*, 50 Ill. 169; *Marvin v. Richmond*, 3 Denio, 58; *Molyneaux v. Collier*, 13 Ga. 415; *McLendon v. Shackelford*, 32 Ga. 474; *Clapp v. Foster*, 34 Vt. 580; *Gulzoni v. Tyler*, 64 Cal. 334; Greenleaf on Evidence, sec. 192; 1 Phillips on Evidence, Cowen & Hill's note No. 124; Wharton on Evidence, secs. 1077, 1090.)

The question asked of the witness Ravekes concerning the statements of Smith when he came up in the elevator were so clearly connected with the accident as to be relevant to the issue between the parties, and the reply was of such a nature that the defendants could not have been prejudiced thereby.

5. We cannot hold that the damages were so excessive as to appear to have been given by reason of any passion or prejudice on the part of the jury.

The plaintiff, at the time of the accident in 1878, was thirty-six years of age, in good health, and engaged in an extensive business, which required great physical activity. The elevator fell with him from the upper floor of the building to the basement, a distance of from forty to forty-five feet, and by the fall he was so injured as to prevent him from continuing his business, and to disable him from engaging in any active occupation. It is unnecessary to recount in detail all the various injuries which he received, or the sufferings which he endured during the time that he was under the care of the surgeon. He was confined to his bed for nearly a year, and it was three years before he could walk the distance of a block. When he was first carried to his house, his limbs were completely paralyzed, his right leg broken with a comminuted fracture, and the bones of the shin protruding from his flesh and clothes, the bones of one ankle broken, and the arch of his foot so

injured as to destroy the joint, and deprive him of all control of the foot. His spinal column received such concussion as to produce a partial permanent paralysis in his legs. At the time of the trial, ten years after the injury, it was shown by the testimony of the surgeons who then examined him, that his right leg had only one fourth of its original vigor, and but little power of motion, and that his other leg was atrophied by reason of the injury to his spinal column, and that he would never recover any further use of his limbs; and also, that as he grew older, he would be likely to lose their use entirely. In addition to this, he received serious injury to his bladder, which remained paralyzed for many months, and caused him to suffer greatly; and also to the rectum, from which he had not become free at the time of the trial. The jury, in addition to the testimony concerning his injuries, had an opportunity to see the plaintiff himself, and determine how far the testimony was corroborated by his appearance.

It is not contended by the appellants that the record discloses any indication of passion or prejudice on the part of the jury in determining the amount of damages which they awarded, other than the mere fact of its amount. The judge before whom the case was tried approved the verdict, notwithstanding the objection to the amount made by the appellants, and in consideration of the character and extent of the injuries shown to have been sustained by the plaintiff, we are not inclined to disregard his action.

The judgment and order are affirmed.

MoFARLAND, J., and GAROUTTE, J., concurred.

DE HAVEN, J., concurring. — I concur in the judgment and in the opinion of Mr. Justice Harrison, except that part which holds that the testimony of the witness Ravekes, upon his re-direct examination, to the effect that while a member of the firm of Whittier, Fuller & Company he had advocated a settlement of plaintiff's claim for damages, was competent as an admission of

a fact by one of the parties in interest, and admissible as such against the other defendants. I cannot accept this as a correct rule of evidence. But still, in my opinion, the ruling of the trial court in admitting this evidence can be justified upon another ground.

The witness, in his examination in chief, testified to material facts tending to show negligence on the part of the servant of defendants in his mode of operating the elevator at the time of the accident which resulted in the injury of which plaintiff complains. The entire purpose of the cross-examination, which was conducted with great skill on the part of the attorney for the defendants, seems to have been to show that some time after the accident the witness was compelled to withdraw from the firm of which he and the defendants were members, because he had overdrawn his account with the firm without the consent of his copartners, and that they had charged him with speculation, and in consequence that their relations were unfriendly at the time of the trial. The inference, of course, sought to be drawn from these facts was that the matters testified to by the witness were not true, and that his testimony was simply the result of the subsequent trouble between himself and the defendants.

Under these circumstances, it was not improper to show by the witness that prior to any difficulty with defendants, his advice to them was entirely consistent with his present testimony, and such as would probably have been given in view of the existence of the facts about which he testified. It is held that former consistent statements of a witness are admissible to support his testimony when it is charged to have been a recent fabrication, in which case, in order to repel such an imputation it is proper to show that the witness made a similar statement at a time when the supposed motive for such fabrication did not exist. (Rupalje on Witnesses, 369, 370); and the evidence under discussion comes within the spirit and reason of the rule just stated. If the defendants desired to show that this ad-

vice was not based upon the facts about which he had given testimony, but such action was simply urged upon the ground that it was wise to avoid a lawsuit, and better to pay an unfounded claim than to be involved in litigation, they should have further cross-examined the witness, and if this had been made to appear, the evidence could have been stricken out; but in the absence of any explanation, the evidence tended in some degree to support the original testimony of the witness, and to rebut the inference which the defendants evidently sought to draw from the circumstances under which they claimed he retired from the firm.

In the examination of a witness for the purpose of showing motive, interest, or prejudice, or in rebutting an imputation of giving testimony from some unworthy motive, much is necessarily left to the discretion of the judge of the lower court; and it does not seem that in this instance there was any improper exercise of discretion in the ruling upon the question referred to.

BEATTY, C. J., and SHARPSTEIN, J., concurred.

[No. 14724. Department One. — July 14, 1892.]

D. W. SHAW, RESPONDENT, v. RUDOLPH MAYER,
APPELLANT.

CONTRACT FOR CROP TO BE SOWN — RIGHT TO VOLUNTEER CROP ON LAND NOT SOWN. — Under a contract by the terms of which the owner of land agreed to furnish 140 acres of land, "more or less," to another person to sow in wheat, in consideration of an interest in the crop, and the latter agreed "to plow and put in wheat the above-mentioned land, in good farmer-like style," whether such contract be considered a lease or a cropping contract, the person sowing the crop has no right in any of the land except that which he sows in wheat, and is not entitled to any part of a volunteer crop growing upon a part of the 140 acres not sown in wheat by him.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.

The facts are stated in the opinion.

W. H. Spencer, for Appellant.

Graves & Graves, for Respondent.

FOOTE, C. — It appears from the record here that the defendant Mayer entered into a written contract with one Pond, which is as follows:—

“Articles of agreement entered into this eighteenth day of October, 1889, between J. H. Pond and Rudolph Mayer. I, J. H. Pond, party of the first part, hereby agree to furnish to R. Mayer 140 acres of land, more or less, to sow in wheat the coming season; in consideration I shall receive one fifth (1-5) of the crop, delivered in Paso Robles, clear of all expenses pertaining thereto. I, Rudolph Mayer, party of the second part, agree to plow and put in wheat the above-mentioned land, in good farmer-like style, and in due time for the season of 1889 and 1890, to furnish seed, and all expenses appertaining thereto.

“In witness, we have attached our signatures.

“J. H. POND.

“RUDOLPH MAYER.”

Pond, the admitted owner of this land when the above contract was made, sold it to the plaintiff, Shaw, by proper conveyance, in February, 1890. Shaw also at that date obtained from Pond an assignment of the agreement between the latter and defendant. Mayer only sowed in wheat nineteen acres of the land included in the contract, and upon ninety-five acres of it there grew a volunteer crop of that grain.

Before any of the crops were harvested, the plaintiff notified the defendant not to cut any of the volunteer crop of grain. But this notice was disregarded, and the defendant harvested and thrashed all of the grain,—that sowed by him, and the volunteer crop as well. In the aggregate, there were 372 sacks of wheat and 21 sacks of screenings. It appears that the volunteer crop was

about the same per acre as the sown crop. The plaintiff brought an action of claim and delivery for the 372 sacks of wheat and the screenings. The jury who tried the case found, under the instruction of the court, that he was the owner and entitled to recover 250 sacks of wheat and six sacks of screenings, and that they were of the value of \$250. In pursuance of the statute in such cases, an alternative judgment for plaintiff following the verdict was entered. From that, and an order denying a new trial, this appeal is taken.

The argument for appellant is, that the contract was a lease of 140 acres of land, and that the defendant was entitled to his share of all that grew on the whole tract, whether sowed in wheat or not, and that, being a tenant in common with the plaintiff, the latter could not maintain this action. And because the court below refused to grant a nonsuit on the motion of the defendant, and gave instructions to the jury not in accord with the theory of the defendant, it is claimed that the judgment and order should be reversed, and a new trial granted.

The whole question involved is one, we think, to be determined from the language of the written contract between Pond and Mayer. As we construe that instrument, whether it be called a lease or a cropping contract, the defendant has no right in any of the land, except that which he sowed in wheat. As to the land which he did not sow, he was not entitled to anything which grew upon or was harvested therefrom. The whole idea pervading the contract is, that as to so much of the 140 acres as the defendant sowed in wheat, he was to have a certain fixed portion of the crop grown thereon, and the owner of the land, who furnished it to be sown in wheat, the balance. As to the other part of the land, *not sown in wheat* by the defendant, he had no interest in it or what grew upon it. Having harvested, thrashed, and taken into his possession the wheat that voluntarily grew on the land of the plaintiff, the defendant was liable in the action brought against him, and the recovery had against him should be upheld.

We therefore advise that the judgment and order be affirmed.

BELCHER, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

GAROUTTE, J., HARRISON, J., PATERSON, J.

[No. 14672. Department One. — July 14, 1892.]

CASSIUS J. JOHNSON, RESPONDENT, v. OWEN
SWEENEY, APPELLANT.

ORAL STIPULATION — EXTENSION OF TIME TO ANSWER — SETTING ASIDE JUDGMENT BY DEFAULT. — Although, as a general rule, a stipulation of counsel cannot be enforced unless put in writing, or entered in the minutes of the court, yet where an oral agreement for an extension of time to answer or demur is admitted, and has been relied upon by the defendant, a judgment by default taken against him in violation of the terms of the stipulation should be set aside.

10. — PROOF OF ORAL AGREEMENT — ADMISSION — EXECUTED AGREEMENT — ESTOPPEL. — If the party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute; but where the facts relied upon by the moving party are not controverted, there is no reason for the application of the rule, and it is too late to repudiate the stipulation after it has been executed.

APPEAL from a judgment of the Superior Court of Solano County, and from an order refusing to set aside a judgment by default.

The facts are stated in the opinion of the court.

Raleigh Barcar, for Appellant.

The entry of appellant's default, and the judgment by default after the demurrer had been filed, was error. (*Acock v. Halsey*, 90 Cal. 215; *Oliphant v. Whitney*, 34 Cal. 25; *Bowers v. Dickinson*, 18 Cal. 420.)

A. J. Dobbins, for Respondent.

A party to an action is not entitled to relief from a

judgment entered against him on account of the negligence of his attorney. (*Smith v. Tunstead*, 56 Cal. 175; *Ekel v. Swift*, 47 Cal. 620; *Reilly v. Ruddock*, 41 Cal. 312; *Coleman v. Rankin*, 37 Cal. 247; *Haight v. Green*, 19 Cal. 115; *Mulholland v. Heyneman*, 19 Cal. 605.) The judge of the trial court could take no notice or cognizance of an oral agreement or stipulation made between attorneys out of court. (*Patterson v. Ely*, 19 Cal. 35; *Reese v. Mahoney*, 21 Cal. 305.) An order denying or granting a motion to set aside a judgment by default, on the ground of mistake, inadvertence, surprise, or excusable neglect of the defaulting party, rests in the sound discretion of the court, and should not be disturbed by this court on appeal, except in a plain case of a gross abuse of this discretion. (*Bailey v. Taaffe*, 29 Cal. 422; *Howe v. Independence Co.*, 29 Cal. 72; *Woodward v. Backus*, 20 Cal. 137; *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17; *Coleman v. Rankin*, 37 Cal. 247; *People v. Frisbie*, 26 Cal. 135; *Dougherty v. Nevada Bank*, 68 Cal. 275; *Garner v. Erlanger*, 86 Cal. 60; *Underwood v. Underwood*, 87 Cal. 523.)

PATERSON, J. — The defendant moved in the court below for an order setting aside a judgment taken against him by default, entered in open court on an *ex parte* application of plaintiff on April 28th, and in support of his motion filed an affidavit made by his attorney, showing, among other things, the following facts: The summons was served upon defendant in the county where the action was commenced, on April 17, 1891. The defendant had, therefore, to and including the twenty-seventh day of April, 1891, to appear and answer or demur. His counsel was engaged in the trial of a case in the superior court on the last day for answering, and in the evening after adjournment, while riding to Vacaville with the plaintiff's attorney, he asked the latter if he would accept service of a general demurrer, waive copy, and give him more time in which to prepare and serve a special demurrer, saying that he would

like until Saturday, May 2d. Thereupon the attorney for plaintiff said he could have until Saturday, or longer if he desired it, in which to file a special demurrer, and that he would accept service of a general demurrer that evening. When the demurrer was presented to the attorney for the plaintiff in the evening, he indorsed upon it his acceptance of service, qualified, however, by the words, "reserving all rights in the premises regarding default in the within-entitled action." The attorney for defendant did not notice the fact that plaintiff's attorney had qualified his acceptance of service of the demurrer until a late hour that night. On the following morning the demurrer, with proof of service, was filed in the clerk's office,—before default was entered. The affidavit states that the affiant relied on the conversation with the attorney for the plaintiff as an agreement to give the defendant until Saturday to prepare a special demurrer. No counter-affidavits were filed.

We think that upon this showing the motion ought to have been granted.

It is a general rule that a stipulation of counsel cannot be enforced unless put in writing, or entered in the minutes of the court; but where an oral agreement for an extension of time to answer or demur is admitted, and has been relied on by the defendant, a judgment by default, taken against him in violation of the terms of the stipulation, will be set aside. If the party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute; but where the facts relied upon by the moving party are not controverted, there is no reason for the application of the rule, and it is too late to repudiate the stipulation after it has been executed. (*People v. Stephens*, 52 N. Y. 310.) In *Huart v. Goyeneche*, 56 Cal. 429, it was held that the defendant was not guilty of negligence in relying upon an oral promise for an extension of time to answer; and an order refusing to set aside a judgment taken against him by default while

relying upon such promises was reversed. In *Woodward v. Backus*, 20 Cal. 137, the court held that the court below did not abuse its discretion in setting aside a judgment by default, although the affidavits of the plaintiff denied that an oral extension of time had been granted. It is true, the question as to the necessity for a written stipulation was not considered by the court in either of the last two cases cited, although it was discussed by counsel in *Woodward v. Backus*, 20 Cal. 137; but the weight of authority is against the application of the general rule to cases of default judgments, and no case has been cited in which a party has been permitted to retract and take advantage of his adversary's acts or omissions, based on reliance upon his oral promise or stipulation.

In the brief, counsel for respondent states that at the hearing of the motion to set aside the default in the court below, he offered to make and file an affidavit to the effect that he had at no time agreed or stipulated with defendant's attorney that the time for filing an answer or demurrer should be extended, but that the court held it could take no notice or cognizance of an oral agreement or stipulation made between attorneys out of court; but the fact does not appear in the transcript, and we are guided only by the record made in the court below and certified to us.

Judgment reversed and cause remanded, with instructions to set aside the default, and permit the defendant to answer.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 14691. Department One. — July 14, 1892.]

**AURELLIA J. CORKER ET AL., APPELLANTS, v. JOHN
FREDERICK CORKER, RESPONDENT.**

GIFT OF COMMUNITY PROPERTY — FRAUD UPON WIFE. — A deed of gift by the husband of a portion of the community property, in order to be a fraud upon the wife, must be made with a fraudulent intent, and is not void *per se*.

ID. — DELIVERY OF DEED — EVIDENCE — INTENTION OF GRANTOR. — Where the grantor delivered the deed to a third person, and the latter carried it to another, stating that the grantor wished him to record it and then deliver it to the grantee, testimony of the person to whom it was last given, as to whether or not he would have delivered it back to the grantor if he had called for it or sent for it, is irrelevant and inadmissible upon the question of the intention of the grantor as to the delivery of the deed.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Edwin Baxter, for Appellant.

J. L. Murphy, for Respondent.

GAROUTTE, J.—Some months prior to his death, John R. Corker made and acknowledged his deed to certain real estate, situate in the county of Los Angeles, wherein his son, residing in the territory of Utah, was named as grantee. The day prior to his death, he delivered the deed to one White, who carried it to E. F. Spence, stating that Corker, the grantor, desired him to record the same, and then deliver it to the grantee, John Frederick Corker. Upon the following day the grantor died, and subsequently the deed was recorded by Spence, and delivered in pursuance of his instructions. This action was brought, and the appeal is prosecuted, by the widow and the remaining heirs at law of the deceased, against the grantee in said deed, asking that the deed be canceled, and the realty therein described be declared the community property of the estate of said deceased, upon the

ground that said deed was never delivered to the grantee, and for the further reason that it was made in fraud of the rights of the wife to the community property. Plaintiffs were nonsuited, and the evidence heretofore quoted is substantially all that is found in the record.

The judgment should be affirmed, as evidence to support the complaint is lacking in many respects.

An issue is created as to whether the realty is separate or community property, but plaintiff offered no evidence to support the allegations of the complaint in this regard. Again, conceding the realty to be community property, a deed of gift by the husband of community property, in order to be a fraud upon the wife, must be made with a fraudulent intent. "A deed of gift of a portion of the common property, by the husband, is not void *per se*." (*Lord v. Hough*, 43 Cal. 585.)

In this case, neither the complaint nor the evidence indicates any attempt to defraud the wife of her rights; and as far as the record discloses, the realty transferred to the son may have been a just and proper advancement, leaving an abundant residue for the widow and remaining heirs.

An objection was sustained to the following question asked the witness Spence: "If after you received this deed from Mr. White at that time, John R. Corker had called for it or sent for it, would you have delivered it back to him?" The ruling of the court was correct, and is directly supported by *Dean v. Parker*, 88 Cal. 288, where the question addressed to the witness was: "Supposing the father had come in a year after he left the deed with you, or in two or three weeks afterwards, and asked you for the deed again, would you have given it to him?" As to this interrogatory the court said: "The objection to this question should have been sustained, as the evidence sought by it was irrelevant. The matter to be determined was, what was the intention of plaintiff's father in leaving this deed with the witness; and for the purpose of arriving at this intention, evidence of any declarations made or conversa-

tions had in relation to that subject, by the said John Dean, at that or any subsequent time, would have been competent; but what the witness would have done if the deed had afterwards been called for can have no tendency to show whether the father did or did not intend in what he did to make a delivery of the deed for the benefit of his son."

The evidence is entirely lacking to prove a non-delivery of the deed to the grantee. Conceding the law to be as appellant claims it, still it is not shown but that the deed was delivered to Spence in pursuance of a prior mutual understanding and agreement between the parties.

There is nothing in the record to indicate but that every act of the grantor pertaining to the transfer of the realty was done with the consent and assent of the grantee. It is not even shown that White was authorized to deliver the deed to Spence for any purpose, or under any instructions from the grantor. The burden of proof was upon the plaintiff, and the allegations of the complaint in many respects stand without support in the evidence.

Let the judgment be affirmed.

HARRISON, J., and PATERSON, J., concurred.

[No. 14695. Department One. — July 15, 1892.]

D. AMESTOY, APPELLANT, v. THE ELECTRIC RAPID TRANSIT COMPANY, RESPONDENT.

ELECTRIC STREET-RAILROAD — VOID FRANCHISE — PLEADING — PROMISE TO PAY FOR STREET PAVING — WANT OF CONSIDERATION. — A complaint in an action upon a written obligation for the payment of money, which alleges that the obligation was given by the defendant, an electric street-railroad company, to repay the plaintiff and other property owners for paving the street, in consideration that the plaintiff would not take any steps to prevent the electric company from tearing up the paving and laying its tracks; and which also alleges facts showing that the franchise of the company is void, having been granted by the city council without power, and that the plaintiff and other property owners could and would have prevented the defendant from laying its tracks on the street but for the promise to pay,—shows a want of consideration for the promise, and states no cause of action.

ID. — ASSIGNMENT OF VOID FRANCHISE — VOID ORDINANCE — CONDITION THAT PROPERTY OWNERS BE REPAID. — An assignment of a void franchise confers no rights, and a void ordinance granting a franchise to the assignee, on condition that the grantee repay to property owners all sums paid by them for paving, which the assignor had been required to do under a former void ordinance, cannot constitute a consideration for a promise to pay the money to the property owners.

ID. — OBSTRUCTION OF STREET — PUBLIC NUISANCE — SPECIAL DAMAGE — CONTRACT AGAINST PUBLIC POLICY. — A track laid and poles erected in the street without authority constitute an illegal obstruction, or public nuisance; and where no fact is averred to show special damage to the plaintiff by the obstruction, an agreement not to prevent it is an agreement not to institute a public prosecution, which is against public policy and void, and cannot constitute a consideration for a promise to pay money for not preventing it.

ID. — TAKING UP OF GRANITE BLOCKS — CONSIDERATION OF PROMISE TO PAY FOR PAVING. — The taking up of granite blocks used in paving the street, and which apparently belong to the city, constitutes no consideration for a promise to pay a property owner for the paving done by him, it not appearing that they were sold to the defendant by the plaintiff, or that the plaintiff consented to their removal in consideration of such promise.

PLEADING — GENERAL DEMURRER — SUPPORT OF JUDGMENT — SUFFICIENCY OF STATEMENT — CITY ORDINANCES. — The same distinction between insufficient facts and an insufficient statement of facts, which prevails when it is considered whether the complaint supports the judgment, should prevail upon general demurrer; and although city ordinances are not set out *in hac verba*, or pleaded as authorized by section 459 of the Code of Civil Procedure, their existence alleged in the complaint must be considered as against a general demurrer.

ID. — GROUNDS OF SPECIAL DEMURRER. — Upon a general demurrer to a complaint, where the facts necessary to constitute a cause of action are

shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the demurrer will be overruled.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

J. L. Murphy, for Appellant.

John Haynes, for Respondent.

TEMPLE, C. — This appeal is from a judgment entered upon demurrer.

From the complaint, it appears that plaintiff owns a lot in the city of Los Angeles, on the west side Los Angeles Street, fronting 83.07 feet on that street. In 1886, the city granted to certain named parties a franchise for a street-railroad, extending through Los Angeles and other streets. The road was only partly constructed, and of course was operated only for a portion of the distance for which the franchise was granted. The franchise was granted upon consideration that the grantees would pave and keep in repair the street between the tracks, and for two feet on each side; the same to be paved whenever ordered paved by the city council, or when the street was paved by owners of frontage. In 1888, the city council by resolution required that portion of Los Angeles Street to be paved, and authorized the paving to be done by private contract. The work was done by owners of frontage, and was accepted by the city. The owners of the franchise did not pave between the tracks, or for two feet on each side, although they were required to do so by the ordinance of the city, but refused so to do. Thereupon the city council directed its street superintendent to remove its rails and track from that street, and the track, rails, and ties were so removed.

The city council claimed that the franchise had been

forfeited for various reasons, which are not set out in the complaint, and the former owners of the franchise, as plaintiff believes, acquiesced in the claim.

Plaintiff and other owners of frontage, finding the street impassable, and believing that the franchise had been forfeited and abandoned, completed the pavement on the street, doing the work which the owners of the franchise had undertaken to do, at a cost to plaintiff of \$215.

In the mean time the company which had owned the franchise had become insolvent, and all its property, including its claim to the franchise, were sold to the defendant.

Afterwards, about April, 1890, defendant desired to lay its track upon the street in front of plaintiff's property, and west of the center of the street, but plaintiff and other owners of frontage objected.

It is averred that defendant's assignors had forfeited their franchise, and defendant had obtained none; that the franchise which had been granted had been used for a railway on which cars were propelled by electricity through an overhead system of wires resting on poles, and was therefore void; that the defendant proposed to lay its track on the street, and place wooden poles on each side thereof, and to place wires thereon, for the purpose of propelling cars by electricity; that defendant knew that its franchise was void, and that it had no right to lay its track or erect its poles or propel cars by electricity without the consent of plaintiff and other owners of property.

The city of Los Angeles, by a valid resolution of its council, prevented the defendant from laying its track upon the street, except upon the condition that the company should repay to property owners on the west side of the street all sums which they have paid for paving, which the former company had been required to do as a condition of its franchise.

The owners of frontage intended to prevent the defendant from laying its track, whereupon the defendant

promised in writing to repay to plaintiff and others, in compliance with the city ordinance; and in consideration that plaintiff would not take any step to prevent defendant from laying its track, and for other valuable consideration, did, on or about October, 1890, in writing, promise to pay the plaintiff \$215 within a reasonable time, and to pay the other property owners the amounts expended by them for such paving.

The plaintiff thereafter did not prevent defendant from laying its track, but the track was laid the whole length of the street.

It is averred that defendant had no right to lay its track on the street, and plaintiff and other owners could and would have prevented it but for the promise to pay set out.

Further, that in building its railway defendant took up and carried away granite blocks belonging to plaintiff, worth fifteen dollars, which he says constitutes a further consideration.

The demurrer is only on the general ground that the complaint does not state facts sufficient to constitute a cause of action. Though other grounds were stated, they were waived.

The point of the demurrer is, that the alleged promise is without consideration.

Respondent states the rule to be, that only those allegations of the complaint are admitted by the demurrer which are material, and which are well pleaded. As a general proposition, that is undoubtedly correct, but it must be taken in connection with the other well-established rules of pleading. A complaint which would be obnoxious to a general demurrer would not support a judgment. When the latter question arises, courts have always discriminated between insufficient facts and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained. Reason requires that this same rule shall be applied in the case

of a general demurrer. Therefore, although the various ordinances are not set out *in hæc verba*, or pleaded as authorized by section 459 of the Code of Civil Procedure, still, as against a general demurrer, their existence must be considered. The same reason would dispose of the objection that there is no specific allegation that the written promise had been delivered; although as to that I think the averment sufficient.

Does the complaint show a sufficient consideration to sustain the promise? Or rather, does the complaint show affirmatively the want of a consideration? For as the writing itself imports a sufficient consideration, such must be the conclusion, unless this presumption has been overcome by the facts stated.

The recitals as to the former railroad company would seem to cut no figure, except to show that the defendant claims to be acting under a franchise which plaintiff avers and shows is void. The ordinance providing that defendant shall not lay its tracks unless upon the condition that it pay for the paving is also averred, and shown to be void so far as it may be claimed to recognize the existence of a franchise.

At that time the city council had no authority to grant a franchise for a street-railway on which cars were to be propelled by electricity. We are not called upon, therefore, to determine whether the council, which must exercise its powers solely in the interest of the public, could grant a franchise on condition that the grantees pay a sum of money to a private individual. Being void, it would constitute no consideration for the promise.

As the track was to be laid and the poles erected in the street without authority, they would constitute an illegal obstruction; in other words, a public nuisance. No fact is averred to show special injury from the proposed nuisance to plaintiff.

It is averred that defendant had no franchise, and plaintiff and others intended to prevent defendant from laying its track in the street. "Whereupon the defendant company promised in writing to repay plaintiff,

and the other property owners along said street, in compliance with the said order of said city council; and also, for the further consideration that the plaintiff would not take any steps to prevent the said defendant from laying its track on the said street, in front of the said property; and for other good and valuable considerations, the said company did, on or about the first day of October, 1890, in writing, promise and agree with plaintiff, and the said other property owners along said street, that it would pay to plaintiff," etc.

As it does not appear that plaintiff would sustain special damage by the obstruction, he could not prevent it except by instituting a public prosecution. The agreement not to do so would be against public policy and void. It would not, therefore, constitute a valid consideration for the promise sued on.

The owners of frontage, singly or combined, could not confer upon defendant the right to the use of the street. It is difficult to see how, therefore, under the circumstances alleged, there could have been any other good or valuable consideration for the promise.

Had the original franchise been valid, and the defendant the assignee of it, the question would have been different; but as its so-called franchise was void, no rights were derived from it by defendant.

It does not appear that the granite blocks were sold to defendant by plaintiff, or that they were taken by his consent, much less than the consent in consideration of defendant's promise to pay for the paving. The blocks were apparently the property of the city.

I think the judgment should be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

HARRISON, J., PATERSON, J., GAROUTTE, J.

[No. 14608. Department One. — July 15, 1892.]

B. C. LATTIN, APPELLANT, v. J. W. GILLETTE ET AL., RESPONDENTS.

STATUTE OF LIMITATIONS — TWO-YEARS CLAUSE — TORTS — CONSTRUCTION OF CODE. — Section 839 of the Code of Civil Procedure, providing that an action upon a contract, obligation, or liability, not founded upon an instrument in writing, must be brought within two years after the cause of action shall have accrued, is applicable to all actions at law not specifically mentioned in other portions of the statute, and includes liabilities arising in consequence of torts committed, as well as those arising from contracts, express or implied, not founded upon an instrument in writing.

1D. — RUNNING OF STATUTE — BREACH OF CONTRACT — DISREGARD OF DUTY. — The statute of limitations begins to run against an action for misconduct or negligence from the date when the misconduct or negligence was completed, and it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty.

1D. — RIGHT OF ACTION — FUTURE DAMAGES — KNOWLEDGE OF NEGLIGENCE. — The right to maintain an action for negligence is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.

1D. — LIABILITY OF SEARCHER OF RECORDS — LIMITATION OF ACTION FOR NEGLIGENCE — LOSS OF TITLE WITHIN TWO YEARS. — One who holds himself out as an examiner of titles is bound to exercise skill and care in making the examination, and is liable in damages for a failure to exercise such skill and care; but an action against a searcher of records, for damages resulting from his negligence in the examination and report upon the condition of the title to realty, must be commenced within two years after the giving of the report, or it is barred by the statute of limitations, although the plaintiff was deprived of a portion of the land by means of a suit brought within two years before the commencement of the action for damages.

1D. — FOUR-YEARS CLAUSE OF LIMITATION — CERTIFICATE OF TITLE — CONSTRUCTION OF CODE. — Section 837 of the Code of Civil Procedure, prescribing the limitation of four years for an action upon a contract, obligation, or liability, founded upon an instrument in writing, refers to contracts, obligations, or liabilities arising from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities, and does not apply to a certificate of title given by a searcher of records employed to examine and make a written report of the conditions of the title, where damages are claimed for negligence of the searcher in giving an incorrect certificate.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

J. D. Bethune, and A. W. Hutton, for Appellant.

Chapman & Hendrick, for Respondents.

HARRISON, J. — In June, 1886, the plaintiff employed the defendants, who were engaged at Los Angeles in the business of searching public records and examining titles to real estate, to examine the title of one Birnbaum to a tract of land in Los Angeles County, for which he had made a contract of purchase, and ascertain if his title was good, and paid them one thousand dollars for their services. The defendants, under said employment therein, made a report to the plaintiff, and gave him a certificate in writing, on the twelfth day of June, 1886, that the title to the land was vested in Birnbaum, free of all encumbrances. Thereupon the plaintiff purchased and paid for the land. Afterwards, and within two years prior to the commencement of this action, a suit was brought in the superior court of Los Angeles County in reference to the title to said land, which the plaintiff was subjected to the cost and expense of defending, and in which a judgment was rendered, to the effect that at the date of said certificate an undivided one half of said land was vested in the heirs of one Smith; and the plaintiff herein was thereupon deprived of the said half of the land. In May, 1890, he commenced this action against the defendants for damages resulting from their negligence in the examination and report upon the condition of the title. Defendants demurred to the complaint, upon the ground, among others, that the suit was not brought until more than two years after the cause of action had accrued, and was therefore barred by the statute of limitations. The court sustained the demurrer to the complaint, and judgment was rendered against the plaintiff, from which he has appealed.

Section 339 of the Code of Civil Procedure provides that an action upon a "contract, obligation, or liability," not founded upon an instrument in writing, must be

brought within two years after the cause of action shall have accrued. This provision was declared in *Pillar v. S. P. R. R. Co.*, 52 Cal. 44, to be "applicable to all actions at law not specifically mentioned in other portions of the statute." The word "liability" is the most comprehensive of the several terms used in this section, and includes both of the others, inasmuch as it is the condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him. It is defined by Bouvier to be "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied, or in consequence of torts committed"; and this definition was approved in *Wood v. Currey*, 57 Cal. 209.

The statute of limitations begins to run against a cause of action as soon as the right of action has accrued. Upon the breach of any special contract, the statute begins to run at the date of the breach, and a right of action growing out of the negligence of another accrues whenever the act of negligence is complete. "When misconduct or negligence constitutes a cause of action, the statute of limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence." (*Wood v. Currey*, 57 Cal. 209.) Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case, the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages which are the measure of such liability may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.

In the present case, the obligation assumed by the defendants arose out of their agreement that they would examine the title of the property, and ascertain if the same was good in Birnbaum, and report the same to the plaintiff. Having held themselves out as examiners of titles, they were bound to exercise skill and care in making such examination, and became liable in damages for a failure to exercise such skill and care; and the breach of their agreement for which they became liable is alleged in the complaint to have been that they "negligently and unskillfully conducted such examination, and did not truthfully report the condition of the title to the plaintiff," but reported, on the 12th of June, 1886, that the title was vested in Birnbaum free of all encumbrances; whereas, in fact, at the date of said certificate he was the owner of only an undivided one half thereof, and the same "appeared of record on the public records of said county." The giving of this certificate was the breach of their agreement, and constituted the negligence for which they became liable. No further or subsequent act was done or contemplated to be done by them under their employment. Their liability for this negligence, if any existed, arose immediately, and an action therefor could have been immediately commenced against them, and unless commenced within two years thereafter, was barred by the statute of limitations.

The running of the statute was not suspended by the fact that the plaintiff did not ascertain the error in the certificate, or by the fact that the existence of the error was not determined by the superior court until more than two years had expired. The judgment of the court did not constitute the negligence of the defendants, but was only evidence that they had been guilty of negligence; and the eviction of the plaintiff under such judgment was not the cause of action against the defendants, but was merely an element in determining the amount of damages that he had sustained by reason of their negligence. "Where an attorney is sued for malpractice, the cause of action arises from the time when such mal-

practice occurred, and that without any reference to the circumstance whether the client then knew the fact or not." (Wood on Limitations, sec. 122.) In cases of damages resulting from malfeasance or misfeasance, "the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned. (Angell on Limitations, sec. 136.) "In actions for official or professional negligence, the cause of action is founded on the breach of duty which actually injured the plaintiff, and not on consequential damage. Thus, in an action against an attorney for neglect of professional duty, it has been held that the statute of limitations begins to run from the time when the breach of duty was committed, and not from the time when the consequential damage accrued." (2 Greenl. Ev., sec. 433.) In *Troup v. Smith*, 20 Johns. 33, a surveyor had been employed to survey a tract of land into lots suitable for sale, but did his work so unskillfully as to cause damage to the plaintiff, for which he brought suit, and to a plea of the statute of limitations replied that the error was not discovered by him for some years after the survey had been completed, but it was held by the court that this fact did not impair the effect of the plea; that the cause of action accrued at the completion of the survey, and not at the time of the discovery of its character, and was barred by the lapse of six years. In *Argall v. Bryant*, 1 Sand. 98, an action was brought against the publishers of the Evening Post for the erroneous publication therein of a legal notice whereby the plaintiff sustained damage. The publication was made in 1835, but the error was not discovered until 1842, and the damage resulting therefrom in a judgment recovered against the plaintiff was not sustained until 1846, upon the payment of which suit was immediately brought for the negligence. It was held that the foundation of the action was the implied promise of the defendant to perform with care and diligence the publication which he undertook, and that this implied promise was broken in 1835, when the error was

committed, and that as an action could have been then maintained, the statute of limitations began to run, and was not affected by the fact that he did not discover the error until a later date, or that he subsequently sustained additional damages. In *Wilcox v. Plummer's Exrs*, 4 Pet. 172, an attorney who had been employed to collect a promissory note was guilty of such negligence in bringing the suit that the indorser was discharged. It was held that the ground of action against the attorney was the breach of his contract to act diligently and skillfully, and arose at the time he committed the blunder in issuing the writ, and not at the determination of the suit. (See also *Howell v. Young*, 5 Barn. & C. 259; *Short v. McCarthy*, 3 Barn. & Ald. 626; *Kearns v. Schoonmaker*, 4 Ohio, 331; 22 Am. Dec. 757; *Northrup v. Hill*, 57 N. Y. 356; 15 Am. Rep. 501; *Moore v. Juvenal*, 92 Pa. St. 484; *Crawford v. Gaulden*, 33 Ga. 174; *Lilly v. Boyd*, 72 Ga. 83.)

The written certificate of title given to the plaintiff by the defendants, although an instrument in writing, is not an instrument upon which their liability is founded. In *Chipman v. Morrill*, 20 Cal. 131, it was held that this provision of the section by its language "refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately, — that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities." The contract which is the basis of the plaintiff's cause of action herein does not "rest in" or "grow out" of this certificate, nor does the certificate contain any obligation or contract that can be enforced, or which is susceptible of a violation on the part of the defendants, or under which any liability can accrue against them. The obligations assumed by them was that created at the time of their acceptance of the employment by the plaintiff, and antedated the making of the certificate. The certificate is not the evidence of this obligation, but is merely evidence of the

act done by them in purported satisfaction of the obligation assumed by them in accepting their employment. Instead of establishing the contract made between them and the plaintiff, it is the evidence relied upon by him to establish the breach of that contract, and necessarily presumes that the contract was complete before it was given. As in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment, and was broken by the giving of the faulty writing.

The judgment is affirmed.

PATERSON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

[No. 14635. Department One. — July 15, 1892.]

DELOS M. DIMMICK, ADMINISTRATOR, ETC., APPELLANT, v. SARAH SMITH DIMMICK, RESPONDENT.

HUSBAND AND WIFE — COMMUNITY PROPERTY — PURCHASE AFTER MARRIAGE — RESUMPTION — BURDEN OF PROOF. — Real estate acquired by purchase during coverture is presumed to be community property, no matter whether the deed be taken in the name of the husband or wife, or both. While this presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence.

ID. — SEPARATE PROPERTY — NECESSITY OF IDENTIFICATION — COMMINGLING OF FUNDS. — In order that property may maintain its status as separate property, it is not necessary that it should be preserved in specie or in kind; yet when it has undergone mutations and assumed other conditions, it is absolutely necessary, in order to maintain its character as separate property, that it be clearly traced and located; and where money belonging to the wife has been so commingled with the funds of her husband, who is an active business man engaged in numerous speculations, so that it is impossible to say that any part of it passed into a particular tract of land purchased by the husband, such tract is community property.

ID. — DELIVERY OF DEED — INTENT — RECORDING — DEATH OF GRANTEE — SUFFICIENCY OF DELIVERY. — Where a deed of realty was delivered to the grantee, with the intention of vesting the title thereto in the grantee, the fact that the grantor requested the grantee to refrain from recording the instrument until after the grantor's death is entirely immaterial; and the grantor's belief, that if the grantee died before the grantor that he could conceal or destroy the deed and thereby reinvest the title in himself, does not militate against the sufficiency of the delivery at the date of the conveyance, or destroy his clear intention to part with the title and vest the same in the grantee.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Wells, Monroe & Lee, for the Appellant.

All property of the wife owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. (Civ. Code, sec. 162.) Real property purchased during marriage with separate funds is separate property. (*Ingersoll v. Truebody*, 40 Cal. 603; *Rich v. Tubbs*, 41 Cal. 34; *Kraemer v. Kraemer*, 52 Cal. 302; *Smith v. Smith*, 12 Cal. 217; 73 Am. Dec. 533; *Mott v. Smith*, 16 Cal. 534; *Ramsdell v. Fuller*, 28 Cal. 38; *Beaudry v. Felch*, 47 Cal. 183; *Martin v. Martin*, 52 Cal. 235; *Hutchinson v. Hutchinson*, 59 Cal. 313; *Moore v. Jones*, 63 Cal. 12; *In re Higgins*, 65 Cal. 407.) Or if purchased with means resulting from ordinary management of property acquired as separate estate. (*In re Higgins*, 65 Cal. 407.) The husband may be held to account as trustee of the wife's separate estate. (*Snyder v. Webb*, 3 Cal. 83; *Ingersoll v. Truebody*, 40 Cal. 603; *Hassey v. Wilke*, 55 Cal. 525; *Greiner v. Greiner*, 58 Cal. 115; *Hutchinson v. Hutchinson*, 59 Cal. 313.) No legal presumption of the delivery of a deed arises from the signing and acknowledgment. The party claiming under it must prove its delivery. (*Boyd v. Slayback*, 63 Cal. 493; *Hill v. McNichol*, 80 Me. 209.) Acknowledgment only proves that it was signed. (*Boyd v. Slayback*, 63 Cal. 493; *Jackson v. Leek*, 12 Wend. 105; *Jackson*

v. *Phipps*, 12 Johns. 421; *Fisher v. Hall*, 41 N. Y. 423; *Woodbury v. Fisher*, 20 Ind. 388; 83 Am. Dec. 325; *Miller v. Physick*, 24 Ark. 244; *Stillwell v. Hubbard*, 20 Wend. 44; *Prutsmann v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; *Huey v. Huey*, 65 Mo. 694.) Delivery is the final act, without which all other formalities are ineffectual. (*Younge v. Guilbeau*, 3 Wall. 641; *Brown v. Brown*, 76 Me. 316; *Tompkins v. Wheeler*, 16 Pet. 106-119; *Hill v. McNichol*, 80 Me. 209.) The deed must be delivered during the lifetime of the grantor; a delivery after his death will have no effect. (*Schoenberger v. Zook*, 34 Pa. St. 24.) To make the delivery good and effectual, the power of dominion over the deed must be parted with. (*Hibberd v. Smith*, 67 Cal. 551; 56 Am. Rep. 726; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Cline v. Jones*, 111 Ill. 563; *Brown v. Brown*, 66 Me. 321; *Cook v. Brown*, 34 N. H. 460; *Johnson v. Farley*, 45 N. H. 505; *Bank v. Webster*, 44 N. H. 264; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455; *Vreeland v. Vreeland*, 21 Atl. Rep. 628; *Ruckman v. Ruckman*, 33 N. J. Eq. 354; *Terhune v. Olds*, 44 N. J. Eq. 146.) The deed referred to was never delivered, and the most that can be said of it is, that it might, perhaps, operate as a testamentary disposition. (See *Cline v. Jones*, 111 Ill. 563; *Vreeland v. Vreeland*, 21 Atl. Rep. 628.)

Horace Bell, and Frederick Stanford, for Respondent.

If a husband uses the property of his wife in his business, or for the support of his family, with the knowledge and assent of his wife, a gift may be inferred in the absence of a contrary agreement. (Perry on Trusts, secs. 639, 640, 666.) A trust may result, if at all, when the title passes, at the incipency of the title. Elmer purchased with his own money, — money he had borrowed from his wife's father. (*Barnard v. Jewett*, 97 Mass. 87; *Davis v. Wetherell*, 11 Allen, 19; *Roberts v. Ware*, 40 Cal. 637.) The property in controversy was acquired by Elmer D. Dimmick during marriage with Julia A., and the title was taken and stood in his name

at her death, and afterwards, until he conveyed it to defendant. The burden, under such circumstances and under the allegations of the complaint, by which it is claimed as separate property of Julia, is on the plaintiff. (*Morgan v. Lones*, 78 Cal. 58; *Ramsdell v. Fuller*, 28 Cal. 42; 87 Am. Dec. 103; *Pizley v. Huggins*, 15 Cal. 131; *Smith v. Smith*, 12 Cal. 224; 73 Am. Dec. 533.) The delivery of the deed was perfect, as it appeared that it was delivered by Elmer Dimmick to the respondent, and placed among her other deeds. (See *Mowry v. Heney*, 86 Cal. 475; Devlin on Deeds, sec. 314.)

GAROUTTE, J. — This is an equitable action to cancel and set aside a deed of certain realty, executed by Elmer D. Dimmick to the defendant, and asking that said property be decreed to be the property of the estate of Julia A. Dimmick, deceased. Said Julia was the first wife of Elmer D. Dimmick, and it is contended by plaintiff that at the time this property was conveyed to defendant it was the property of the estate of said deceased wife Julia, by virtue of its being her separate property at the date of her death. It is further contended that the deed to the defendant was never delivered, and hence no title passed to her. Judgment went for the defendant, and his appeal is prosecuted from that judgment, and the order denying a motion for a new trial.

The deed sought to be set aside is a deed of gift made to the defendant Sarah Smith Dimmick, the second wife of Elmer D. Dimmick, and dated February 2, 1889. The finding of the court, that the realty described in this deed was not the separate property of Julia A. Dimmick, deceased, is fully supported by the evidence. It appears that she and Elmer D. Dimmick were married in Pennsylvania, nearly fifty years ago. That subsequently he received a gift of a small tract of land from his father, and that later she received some money from the estate of her father. He also obtained a loan of the sum of \$1,360 from his father-in-law, which he invested in land. This indebtedness was afterwards canceled,

upon the understanding that it should be deemed as an advancement to them from her father's estate. It is not necessary to an affirmance of the judgment in this case that we examine in detail the status of the real estate purchased by the husband with the above-mentioned funds, although it would seem that the wife's separate estate would consist of the indebtedness due to her father from the husband rather than the real estate previously purchased with the funds which created the indebtedness.

As described by one of the witnesses, the husband was an "industrious, thrifty, economical, and intelligent farmer and blacksmith." He also traded in real estate, and whatever money his wife received by inheritance, or otherwise, passed into the common fund, and its identity forever lost in the purchase of numerous tracts of real estate, the titles to which were all taken in his name. It is unnecessary to follow in detail the migrations of these parties to Iowa, and from thence to California; it appears that the husband always had the complete and entire control and conduct of the property, selling and buying where and when he chose. While the evidence discloses that the proceeds of the realty owned in Pennsylvania were brought to Iowa, there is no evidence that any money was brought by them to California. It further appears that they made a deed of gift of quite a valuable tract of land to a son, and that the husband was the recipient of a gift of fifteen hundred dollars from his brother. In addition to all these facts, there is no evidence whatever as to the source of the particular funds which paid for the land involved in this litigation.

The principle of law is established beyond question, that real estate acquired by purchase during the existence of the married relation, no matter whether the deed be taken in the name of the husband or wife, or both, creates the presumption that such property is common property. While this presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence. (*Ramsdell v. Fuller*,

28 Cal. 42; 87 Am. Dec. 103; *Morgan v. Lones*, 78 Cal. 62.) In order that property may maintain its status as separate property, it is not necessary that it should be preserved in specie or in kind; yet when it has undergone mutations and assumed other conditions, it is absolutely necessary, in order to maintain its character as separate property, that it be clearly traced and located. (*Chapman v. Allen*, 15 Tex. 283; *Rose v. Houston*, 11 Tex. 326; *Schmeltz v. Garey*, 49 Tex. 60.) The money expended in the purchase of the realty involved here should have been traced back to the separate estate of Julia A. Dimmick, not by way of surmises and probabilities, but by plain and connected channels. While the wife had some separate property very many years ago, at that time it passed into the hands and commingled with the funds of her husband, an active business man engaged in numerous speculations in land, so numerous and so varied that at the date of this recent transfer it is impossible to say that one dollar of the money which she received from her father's estate, or its proceeds, passed into this tract of land. The burden was upon the plaintiff to make the proof, and thus overcome the presumption which is indulged in by the law; he has failed to do so, hence the finding of the court cannot be disturbed.

The evidence fully supports the finding that the deed was delivered by the grantor to the defendants. It was clearly his intention to vest the title of the realty in her, and the fact that he requested her to refrain from recording the instrument until after his death was entirely immaterial. Conceding he believed that if she should die first he could conceal or destroy the deed, and thereby reinvest the title in himself, still such fact does not militate against the sufficiency of the delivery at the date of the conveyance, or destroy his clear intention to part with the title and vest the same in her.

Let the judgment and order be affirmed.

HARRISON, J., and PATERSON, J., concurred.

[No. 14684. Department One. — July 15, 1892.]

J. W. GREEN, APPELLANT, v. THE COUNTY OF FRESNO, RESPONDENT.

COUNTY GOVERNMENT ACT — COUNTIES OF TWENTY-SIXTH CLASS — FEES OF CONSTABLES — CONSTITUTIONAL LAW — COMPENSATION PROPORTIONED TO DUTIES. — Section 188 of the County Government Act, as amended March 16, 1889, determining what fees shall be allowed to constables in counties of the twenty-sixth class, is not repugnant to section 5 of article II. of the constitution, providing that the compensation must be regulated "in proportion to duties."

ID. — MATTER OF FACT — PROVINCE OF LEGISLATION. — What compensation of an officer should be deemed "in proportion to his duties" is a matter of fact to be ascertained and determined by the legislature, and not by the courts.

ID. — REVIEW OF ACTION OF SUPERVISORS — AGREED STATEMENT OF FACTS — PRESUMPTION — EXCESS OF LIMIT. — In a proceeding in the superior court of Fresno County to review the action of the board of supervisors of that county in rejecting portions of each claim presented for constable's fees, where the case was submitted upon an agreed statement of facts, which did not show upon what ground they were rejected, the superior court was authorized to presume that they were rejected upon any ground negatived by the statement, and that they were properly rejected because in excess of the fifteen-hundred-dollar limit fixed by section 188 of the County Government Act.

ID. — EFFECT OF AGREED STATEMENT — RESTRICTION TO FACTS ADMITTED. — Where a case is submitted under an agreed statement of facts, the consideration of the court is restricted to the facts admitted, and its judgment cannot be based upon any other facts which it may suppose one of the parties can establish.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion.

Newman Jones, and *W. B. Jacobs*, for Appellant.

D. W. Tupper, and *H. H. Welsh*, for Respondent.

VANOLIEF, C.—This case was submitted to the trial court upon an agreed statement of facts substantially as follows:—

In May, 1891, the plaintiff presented to the board of supervisors of the county of Fresno, in due form, his

claim for official services as constable of township No. 1, rendered in criminal cases, and for money expended during the month of March of that year, amounting to \$412.40. His claim was allowed for all items of money expended, amounting to \$32.80, and for \$125 for services, but was rejected as to the balance of \$254.60, claimed for services.

In April, 1891, C. W. Fraser, as constable of township No. 3 of that county, duly presented to the board of supervisors his claim for \$332.90, for official services in criminal cases, rendered during the same month (March, 1891), which was allowed for \$125, but rejected for the balance of \$207.90.

The fees charged for services in each case were such as are allowed by law.

Neither plaintiff nor Fraser accepted the sum allowed him. Fraser assigned his entire claim to plaintiff, who, upon the stipulated facts, seeks to recover the full amount of both claims.

Prior to March 31, 1891, Fresno County was a county of the twenty-sixth class, according to the classification made by the County Government Act of March 14, 1883; but by the revision of that act, approved March 31, 1891, it became a county of the eighth class.

Since January 1, 1891, there have been fourteen constables in said county, nine of whom have not earned or presented claims for more than \$125 for any one month since January 1, 1891, on account of services in criminal cases, "but each of said nine constables has, during each of the months since January 1, 1891, earned in such cases . . . and presented claims for the same, various sums less than the \$125 per month, all of which last-mentioned claims have been allowed and paid in full."

The judgment was for defendant, and the plaintiff appeals therefrom upon the judgment roll, which wholly consists of the stipulated statement of facts and the judgment.

During the month in which the services were performed, section 188 of the County Government Act, as amended March 16, 1889 (Stats. 1889, p. 279), was in force; and so far as applicable to constables, was as follows:—

“Sec. 188. In counties of the twenty-sixth class, the county and township officers thereof shall receive as compensation for the services required of them by law, or by virtue of their office, the salaries as follows, to wit:

“14. Constables, such fees as are now or may be allowed by law; *provided*, that no constable shall receive more than fifteen hundred dollars per annum for all services rendered by him in criminal cases, or in actions or proceedings to which the people of the state of California are or may be parties; and no claim of any such constable in excess of the sum last named shall be allowed or paid, but all fees collected by such constable in criminal cases in excess of fifteen hundred dollars shall belong to and be the property of the county in which said constable acts. The provisions hereof shall not affect the present incumbents.”

By the act of March 31, 1891 (Stats. 1891, p. 345), the above section was amended and re-enacted as “section 170.” As thus re-enacted, section 170 of the act of 1891 not only limits the compensation of constables in Fresno County, now ranked in the eighth class, for services in criminal cases, to \$1,500 per annum, but requires it to be paid in monthly installments *not to exceed \$125 in any one month*.

Section 234 of the same act, March 31, 1891 (Stats. 1891, p. 421), is as follows:—

“Sec. 234. The provisions of this act, unless otherwise herein provided, so far as it relates to the fees and salaries of all officers named, except justices of the peace and constables, shall not affect the present incumbents; *provided*, that when the salary of any such officer, or fees in lieu of such salary, is not now fixed by law, the same shall, as to such officer, take effect immediately.”

1. Counsel for appellant contend that each of the above-quoted sections is unconstitutional. But the record raises no question as to the constitutionality of sections 170 and 234 as enacted March 31, 1891. There is nothing in the act purporting to give either of these sections any retroactive effect. Nor is there anything in the record indicating that the trial court applied them to this case.

2. It is insisted, however, that section 188, as amended March 16, 1889, does not regulate the compensation of constables "in proportion to duties"; and therefore is repugnant to section 52 of article II. of the constitution.

What compensation of an officer should be deemed in proportion to his duties is matter of fact to be ascertained and determined by the legislature, and not by the courts. (*Longan v. County of Solano*, 65 Cal. 122.) In the class of counties to which the defendant county belonged when the services in question were performed, the legislature determined that certain fees allowed by law for services in civil cases, and also the fees allowed by law for services in criminal cases not exceeding fifteen hundred dollars per annum, would be in proportion to the duties of constables in that class of counties. Had the legislature given to each constable a salary of fifteen hundred dollars per annum, it would not be pretended that the courts could interfere on the ground that such salary is not in proportion to the duties of each constable; yet the mode adopted by the legislature by which to regulate the compensation of constables effects a nearer approach to a just proportion between the compensation and duty of each constable of the class than would a fixed salary common to all. (*Dougherty v. Austin*, 94 Cal. 601.)

3. The agreed statement of facts shows that the board of supervisors rejected portions of each claim for fees, but does not show upon what ground they were rejected. Upon this statement alone, the superior court was asked to review and reverse or modify the action of the tri-

bunal having original jurisdiction of the subject-matter. Under these circumstances, the superior court was justified in presuming that the action of the board of supervisors was correct, unless the agreed statement affirmatively showed it to have been erroneous. If the claims may have been properly rejected by that board, upon any ground not negatived by the statement, the superior court may have presumed that they were properly rejected upon that ground. For aught that appears, that portion of each claim that was rejected may have been wholly in excess of fifteen hundred dollars already allowed to each claimant for services rendered in criminal cases during the year 1891. This not being negatived, the presumption here must be that the superior court did not err in giving judgment for defendant. The obligation of the defendant to pay more than was allowed by its board of supervisors is not a necessary consequence of the stipulated statements of facts. The conclusion of law from the facts stated is, merely, that the plaintiff is entitled to recover such portions of his demands as will not effect a transgression of the fifteen-hundred-dollar limit fixed by section 188, above quoted. But whether or not the effect of a recovery of any sum would be to exceed that limit does not appear. The defect of the statement is not merely a failure to state the breach of an obligation, but also consists of a failure to show that defendant was ever under any obligation to pay the claims disallowed by the board of supervisors. The fact that an allowance of the claims in question would not have transgressed the statutory limit of fifteen hundred dollars was necessary to constitute the obligation; and therefore the insertion of it in the agreed statement could not have been regarded as a reply to an anticipated defense. Both an obligation and a breach of it must have been stated before any defense was necessary. The averment that the claims in question had not been paid, without showing an obligation to pay them, is of no consequence.

As this case was submitted upon an agreed statement

of facts, under section 1138 of the Code of Civil Procedure, "the consideration of the court was restricted to the facts admitted, and its judgment could not be based upon any other facts which it may have supposed the plaintiff could establish." (*Crandall v. Amador County*, 20 Cal. 73.)

I think the judgment should be affirmed.

BELCHER, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

GAROUTTE, J., HARRISON, J., PATERSON, J.

[No. 14709. Department One. — July 15, 1892.]

MATTIE H. MERRILL, APPELLANT, v. F. H. MERRILL, RESPONDENT.

VENDOR AND PURCHASER — RESCISSION OF CONTRACT — RECOVERY OF PURCHASE-MONEY PAID — PLEADING — EXCUSE FOR TENDER AND DEMAND — WITHDRAWAL OF ESCROW BY VENDOR. — A complaint, in an action to recover purchase-money paid under a contract for the purchase of land, need not allege a tender of the residue of the purchase-money, and a demand for a deed, if it shows a sufficient excuse for the omission, and where such complaint alleges that by the terms of the contract the deed to the land was placed in escrow, to be held until the final payments should be made, and that the vendor withdrew the deed from the holder thereof, and denied the right of the plaintiff to purchase under the contract, with intent to rescind the contract, it sufficiently shows that a tender of the balance of the purchase-money and a demand for the deed would have been of no avail, and entitles the plaintiff to the relief sought, as against a general demurrer.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Brousseau, Hatch & Thomas, and *Waldo M. York*, for Appellant.

Richard Dunnigan, and *J. M. Voss*, for Respondent.

VANOLIEF, C. — On August 29, 1887, a written contract was executed by and between F. H. Merrill, Otto Froelich, and C. T. Hopkins, by the terms of which Merrill agreed to sell to Froelich an undivided one-sixth part in the south half of the northeast quarter and the southeast quarter of section 21, township 2 south, range 13 west, San Bernardino base and meridian, known as the "Merrill and Hancock tract," and "being the interest to which said Merrill is entitled under the will of his late father, Ed. Merrill, deceased, for the sum of twelve thousand five hundred dollars, to be paid as follows": \$1,500 on the execution of the agreement, the receipt of which is acknowledged; \$1,500 in sixty days from date of agreement; \$4,750 in six months; and \$4,750 in nine months from date. The agreement then proceeds as follows: "The deed of said lands from said Merrill to said Froelich is placed herewith in escrow, with said Hopkins, . . . to be held by said Hopkins until the final payments are made to said Merrill as above stated. In case of the default in the payment of the sums of money paid as herein named, . . . then said sums of money are to be considered forfeited by said Froelich to said Merrill, and said Hopkins hereby agrees to return and deliver said deed to said Merrill. In the event of the payment of the sums of money to said Merrill as herein specified, then said Hopkins is to deliver said deed to said Froelich, and said Hopkins hereby agrees so to do. The proceedings now pending for distribution of said property to said Merrill, in the superior court of Los Angeles County, state of California, are hereby held in abeyance, and continue so till default shall be made in this agreement, when said Merrill shall be at liberty to revive said proceedings for such distribution; but in case this contract is fulfilled according to the terms above mentioned, then said proceedings for distribution are to be dismissed."

It is averred in the complaint that in making this agreement Froelich acted solely as agent for the plaintiff, and that it was made for her benefit alone, of which

defendant had notice at the time it was made; and that plaintiff paid to defendant the first two installments with her own money according to the agreement, of which defendant also had notice at the times those payments were made. The complaint then proceeds as follows:—

“5. That at the——of the execution of the said contract, the said F. H. Merrill had no right or title in or to said lands described in said contract; that the said Froelich and said plaintiff did not know that the said defendant had no right or title to said lands, and the said Froelich and the said plaintiff believed that the said F. H. Merrill had the right and title to a one-sixth undivided interest in and to said lands.

“6. That on or about the first day of March, 1889, the said defendant reclaimed the deed mentioned in the said contract, which he had theretofore, in accordance with the terms of said contract, executed and placed in the hands of said Hopkins, in escrow, and rescinded the said contract, and denied the right of said Froelich and the said plaintiff to purchase the same under and by virtue of said contract; that the said defendant gave plaintiff no notice of his intention to rescind said contract, and did not at any time demand of plaintiff the balance due thereon, or any payment or payments thereon, and did not at any time tender to her or offer to deliver to her the said deed on the payment of the said balance due, and did not notify her that he had rescinded said contract, and plaintiff had no knowledge that defendant had rescinded said contract or taken back said deed until after the first day of March, 1889.

“7. That on the twenty-seventh day of March, 1888, the said F. H. Merrill acquired a one-sixth undivided interest in and to the tract of land described in said contract, and has been ever since that time and now is the owner thereof.

“8. That the said defendant, notwithstanding the facts aforesaid, has not repaid to plaintiff or the said Froelich the said sum of three thousand dollars, or any part thereof, but claims and asserts that the said three

thousand dollars has been forfeited to him, the said defendant, by the said plaintiff, and refuses to pay her or said Froelich the same or any part thereof.

"9. That since the said surrender of said deed by said Hopkins to said defendant, the said Froelich, by an instrument in writing, duly assigned, transferred, and set over to plaintiff whatever claim he, the said Froelich, had for the recovery of the said three thousand dollars, and all causes of action he might have against said defendant, relating thereto, or arising from or under said contract."

The prayer is, that plaintiff have judgment against the defendant for three thousand dollars and interest; that the judgment be declared a lien upon the land, and that the land be sold, etc.

The defendant demurred to this complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and as plaintiff elected to stand upon her complaint without amendment, gave judgment for defendant.

The appeal is from the judgment upon the judgment roll, and presents the question whether, as against a general demurrer, the complaint is sufficient to entitle the plaintiff to any relief whatever.

Some parts of the complaint are indefinite and uncertain, and apparently inconsistent with each other, but, exclusive of these, I think the complaint states a cause of action for the recovery of the purchase-money paid by plaintiff. The only ground upon which respondent's counsel undertake to justify the judgment is, that it is not averred in the complaint that plaintiff ever tendered payment of either of the last two installments of the purchase-money; and no doubt this point should be sustained, unless the complaint shows a sufficient excuse for having omitted to make such tender. In the leading case on this point, *Englander v. Rogers*, 41 Cal. 420, the court, by Crockett, J., said: "The covenants of the vendor and vendee were mutual and dependent, and neither

could put the other in default, except by tendering a performance on his own part, unless the other party either waived the tender, or by his conduct rendered it unnecessary. To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase-money, or *some sufficient excuse* for the omission to tender it." There is nothing in conflict with this in the case of *Dennis v. Strassburger*, 89 Cal. 588, cited by respondent. (See also *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257; *Newton v. Hall*, 90 Cal. 487.)

I think, as against a general demurrer, the sixth paragraph of the complaint shows a sufficient excuse for the omission of plaintiff to tender the purchase-money and demand a deed before the commencement of this action. The facts substantially alleged that defendant "reclaimed" (withdrew) the escrow deed from Hopkins, and denied the right of plaintiff to purchase under the contract, with intent to rescind the contract, show that a tender of the purchase-money and demand for the deed would have been of no avail. (*Dowd v. Clarke*, 54 Cal. 48.) In *Wood v. McDonald*, 66 Cal. 547, the court, by Mr. Justice McKinstry, said: "Proof of any circumstance which would satisfy a jury that a demand would be unavailing—as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver—will be sufficient to excuse proof of a demand."

I think the judgment should be reversed, with leave to defendant to answer; and also with leave to plaintiff to amend her complaint if so advised.

BELCHER, C., and TEMPLE C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed, with leave to defendant to answer; and also with leave to plaintiff to amend her complaint if so advised.

GAROUTTE, J., HARRISON, J., PATERSON, J.

[No. 14673. Department One. — July 15, 1892.]

C. H. POOLE, APPELLANT, v. ALICE S. WILBER, ETC.,
RESPONDENT.

ANNULMENT OF MARRIAGE — ALIMONY PENDENTE LITE — DETERMINATION OF ISSUES — REVIEW UPON APPEAL. — Upon the hearing of a motion for alimony *pendente lite* and counsel fees, in an action for the annulment of a marriage, the trial court cannot determine the issues raised by the pleadings, and the supreme court has no jurisdiction to determine them upon appeal from an order granting such motion, nor to determine the correctness of an order overruling a demurrer to the complaint.

ID. — ISSUE AS TO SUBSEQUENT MARRIAGE — ALLOWANCE OF ALIMONY. — Where the marriage is claimed to be a nullity, and is sought to be annulled on the ground of a previous marriage of the defendant with another person, but the defendant avers a subsequent marriage with the plaintiff after the disability was removed, and prays for alimony. upon appeal from an order allowing alimony to the defendant, it need not be considered whether the issue as to the subsequent marriage is sustained upon the hearing of the motion.

ID. — ALIMONY WITHOUT CLAIM FOR DIVORCE — CROSS-COMPLAINT OF WIFE. — Under section 187 of the Civil Code, which provides that the wife in case of desertion may maintain an action for permanent support without applying for a divorce, and that the court may, in its discretion, require the husband to pay alimony during the pendency of the suit, and money necessary for the prosecution of the action, a wife who is sued for the annulment of a marriage may file a cross-complaint for relief under that provision.

ID. — AMOUNT OF ALIMONY — DISCRETION AS TO ALLOWANCE. — Upon a motion for an order granting alimony *pendente lite* and counsel fees to the defendant, where the affidavits used upon the hearing show that the only property belonging to the parties or to either of them is a house and lot, to the procurement of which both parties contributed, the title to which is in the defendant, and which is occupied by her, but that it produces no income; that the defendant has no means of support, and that the plaintiff's income is about \$145 per month, — an order by the court that the plaintiff pay to the defendant \$45 per month, and \$100 counsel fees, is not an abuse of discretion.

APPEAL from an order of the Superior Court of San Diego County granting alimony *pendente lite* and counsel fees.

The facts are stated in the opinion.

Hunsaker, Britt & Goodrich, for Appellant.

To constitute a valid marriage, the parties must be able to contract (*Graham v. Bennett*, 2 Cal. 506), and they must actually contract *in verba præsenti*. (*Van Tuyl v.*

Van Tuyl, 57 Barb. 235; *Appleton v. Warner*, 51 Barb. 270; *Fenton v. Reed*, 4 Am. Dec. 244; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105. A subsequent marriage contracted while one of the contracting parties has a living husband or wife is absolutely null. (Civ. Code, secs. 61, 82.) The mere living together does not constitute a marriage. (*Letters v. Cady*, 10 Cal. 537.) Proof of living together is not proof of marriage. (*Kelly v. Murphy*, 70 Cal. 561; *Arnold v. Cheseborough*, 46 Fed. Rep. 700; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105.) The fact that the defendant believed she was divorced did not make her so in fact. (*White v. White*, 105 Mass. 325; 7 Am. Rep. 526; *Thomas v. Thomas*, 124 Pa. St. 646; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105, and notes.) Where the marriage is a nullity, alimony and court expenses cannot be allowed. (*Finn v. Finn*, 62 How. Pr. Rep. 89, and authorities cited; *Appleton v. Warner*, 51 Barb. 271; Civ. Code, sec. 137.) Even in actions for divorce, alimony and court expenses *pendente lite* are not allowed, unless the marital relations are either admitted, or if denied, proved to the satisfaction of the court, and the onus is upon the applicant to establish that fact with reasonable certainty; and she should produce the best evidence in her power. (*Collins v. Collins*, 80 N. Y. 4-10.)

Works, Gibson & Titus, for Respondent.

In cases of this kind, the court cannot stop, upon a preliminary motion for alimony, to determine the real question in issue, viz., whether the parties are married or not. The other necessary facts being shown, the court will, and should, compel the man who has enjoyed the privileges and rights of a husband for years to contribute sufficient means to the defendant to enable her to establish if she can that she is his wife. (1 Am. & Eng. Ency. of Law, 472; *Griffin v. Griffin*, 47 N. Y. 134; *Vandegrift v. Vandegrift*, 30 N. J. Eq. 76; *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460; *North v. North*, 1 Barb. Ch. 241.) The facts alleged in the defendant's

answer and cross-complaint show a valid marriage. (*Sharon v. Sharon*, 75 Cal. 1; *Sharon v. Sharon*, 79 Cal. 633; *White v. White*, 82 Cal. 427; *Teter v. Teter*, 101 Ind. 129; 51 Am Rep. 142; *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460; *Betsinger v. Chapman*, 88 N. Y. 487, 496; *Hutchins v. Kimmell*, 31 Mich. 130; 18 Am. Rep. 165; *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359; *Meister v. Moore*, 96 U. S. 76; *Maryland v. Baldwin*, 112 U. S. 490; *Badger v. Badger*, 88 N. Y. 546; 42 Am. Rep. 263.)

HAYNES, C.—This appeal is from an order granting respondent alimony *pendente lite* and counsel fees, upon her motion for that purpose.

The complaint alleges a marriage with the defendant in 1881, that at the time of the marriage defendant had a husband living, from whom she had not been divorced, and on that ground plaintiff seeks to annul his said marriage.

Defendant's answer admits her marriage to plaintiff and her former marriage, alleges that her marriage to plaintiff was in good faith, believing she had been divorced, that they lived together as husband and wife from that time until April, 1891, when plaintiff deserted her; and further, that a divorce was obtained by her former husband March 31, 1882, and alleges: "That in the month of February, 1888, they removed to the city of San Diego, state of California, from which time they mutually consented to and did marry." Defendant also filed a cross-complaint, praying that the said marriage be declared legal, and for alimony.

Demurrers to the answer and cross-complaint were interposed by plaintiff, which were overruled, and upon defendant's motion, alimony, in the sum of forty-five dollars per month and one hundred dollars counsel fees, were ordered to be paid her by plaintiff.

A bill of exceptions was taken by plaintiff, setting out the pleadings and the affidavits of the parties for and against the motion. The affidavits are long, and except as to the former marriage of defendant and its ex-

instance at the date of her marriage to appellant, are irreconcilably conflicting.

Appellant contends that his marriage to defendant was void, that mere living together does not constitute a marriage, and that proof of living together is not proof of marriage.

These questions are not before us. The superior court could not have determined them and entered a judgment in the case upon the affidavits used upon the hearing of the motion. To decide these questions would be to exercise an original jurisdiction this court does not possess.

By overruling plaintiff's demurrers, the court below has decided that there is an issue between the parties, and the correctness of that ruling cannot be considered on this appeal.

Appellant's further contention, that where the marriage is a nullity alimony and court expenses cannot be allowed, is met by the issue raised as to a subsequent marriage after the disability was removed; and whether that issue is sustained by the affidavits used on the hearing of the motion we need not consider.

Appellant further contends that alimony and counsel fees can only be allowed under section 137 of the Civil Code in actions for divorce.

In *Galland v. Galland*, 38 Cal. 265, it was held that the provision for alimony made in the statute concerning divorces was not intended to be a prohibition of the granting of alimony in other cases; that such powers fall within the general jurisdiction of a court of equity, and exist independently of statutory authority. This case arose before the code was enacted, but section 137 of the Civil Code provides, among other things, that the wife may, in case of desertion, maintain an action for permanent support without applying for divorce, and in such action the court may, in its discretion, require the husband to pay alimony during the pendency of the suit, and money necessary for the prosecution of the action.

Respondent's cross-complaint is made under this provision, and entitles her to the relief granted by the order,

even if the court had no power to grant it had she rested on her answer to appellant's complaint.

The affidavits show that the only property belonging to the parties, or to either of them, is a house and lot in the city of San Diego, to the procurement of which both parties contributed, the title to which is in respondent, and which has been occupied by her since the alleged desertion of her by appellant, but that it produces no income; that respondent has no means of support, and that appellant's income is about \$145 per month.

We think the court did not abuse its discretion in making the order.

We therefore advise that the order appealed from be affirmed.

BELCHER, C., and FOOTE C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 18017. In Bank. — July 20, 1892.]

C. J. DIEFENDORFF, APPELLANT, v. PETER HOPKINS, RESPONDENT.

ACTION FOR CONVERSION OF GOODS — JUDGMENT FOR DEFENDANT — FAILURE TO FIND VALUE OR DAMAGE. — A judgment for the defendant for costs, upon findings in his favor in an action for conversion of goods, is not rendered erroneous by the absence of an express finding on the issue of value and damage.

ID. — FINDINGS — ISSUES RENDERED IMMATERIAL. — The failure to find upon an issue which has become immaterial is not a prejudicial error. The parties to an action have no right to a finding upon every specific issue in a case merely because they may plead it as *res adjudicata* in some possible future controversy where it may become material.

ID. — JUSTIFICATION UNDER ATTACHMENT AGAINST PLAINTIFF'S VENDOR — STATUTE OF FRAUDS — CHANGE OF POSSESSION — PLEADING — SUFFICIENCY OF ANSWER — APPEAL — OBJECTION FOR FIRST TIME. — Where the defendant, in an action for the conversion of goods, justified under a writ of attachment against the vendor of the plaintiff under the statute of frauds for want of a sufficient change of possession, and the trial was conducted in the trial court without demurrer to the answer or objection

to evidence, upon the assumption of all parties that the plea was sufficient in form, it cannot be objected to for the first time upon appeal.

HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — GIFT BY HUSBAND FROM COMMUNITY PROPERTY — COMMINGLING OF PROPERTY. — Property acquired after marriage may, as between husband and wife, become the separate property of the latter by gift and community property may be allowed by the husband to be so mingled with the profits of the wife's separate estate as to indicate an intention that it should be her separate property.

ID. — BOARDING-HOUSE KEPT BY WIFE — TITLE TO FURNITURE. — Where a married woman has carried on boarding-houses with her separate funds mingled with a monthly allowance from her husband for the support of herself and children, and the whole course of conduct of both husband and wife for years, and all their declarations, show that she managed the boarding-houses, and bought and sold and exchanged furniture as she pleased, and in her own name, with her husband's knowledge and tacit consent, the husband repudiating any concern in the business, or any responsibility for its debts, and advising the wife to give it up, the circumstances are sufficient to overcome the presumption that the furniture so purchased is community property, and to establish the title of the wife to it as her separate property, which may be seized for her debts.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Thornton & Merzback and *George A. Blanchard*, for Appellant.

Freeman, Bates & Rankin, for Respondent.

THE COURT.—Upon further consideration of this case, we are satisfied with the conclusion reached in Department One on the former hearing, and with the opinion then filed, and for the reasons stated in that opinion, the judgment and order are affirmed.

The following is the opinion above referred to, rendered in Department One on the 10th of December, 1891:—

BEATTY, C. J.—The defendant, as sheriff of the city and county of San Francisco, levied a writ of attachment, issued in an action commenced by certain creditors of Mrs. M. A. Rix, against her and her husband, upon the furniture of a boarding and lodging house known as the "Colonnade." The plaintiff, claiming to be the owner

of the property attached, as vendee of the husband, demanded it of the defendant, and his demand being refused, commenced this action to recover damages for its conversion. The findings and judgment of the superior court were in favor of the defendant, and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial. In support of his appeal from the judgment, the plaintiff makes two assignments of error: "1. The judgment is erroneous on the face of the record, because there is no finding on the material issue of value and damage to the plaintiff; 2. The justification as pleaded is insufficient upon the face of the answer in this, that it is not alleged that either an affidavit or undertaking on attachment was filed in support of the writ under which the defendant justifies." In considering these assignments, it is necessary to state the substance of the complaint and answer. It is alleged in the complaint that the defendant is sheriff; that on June 20, 1886, plaintiff was the owner and entitled to the possession of the furniture in the Colonnade; that on said day the defendant took said furniture and converted it to his own use; that the plaintiff thereafter, and while still the owner and entitled to the possession of said furniture, demanded of the defendant its redelivery and surrender to him; that said demand was refused; that said furniture is of the value of twenty thousand dollars; and that plaintiff has been damaged in that amount by said wrongful taking and conversion. The answer denies that plaintiff was ever the owner or entitled to the possession of all or any part of the furniture described in the complaint; denies that the defendant ever converted it, or any of it, to his own use; denies that surrender or redelivery has been demanded; denies that the furniture is worth any more than three thousand dollars; and denies that plaintiff has been damaged in any sum whatever. Following these denials, in what is designated in the findings of the superior court as subdivision 2 of the answer, are the following allegations: "Defendant, further answering, as a further defense to

said action, avers that on the first day of June, 1886, one Margaret A. Rix was, and for a long time prior thereto had been, and still is, the sole owner of all the property described in plaintiff's complaint; that on said first day of June, 1886, an action was duly commenced by one P. D. Barnhard against the said Margaret A. Rix and her husband, Alfred Rix, in the superior court of the city and county of San Francisco, state of California, to recover the sum of \$5,451.90, alleged to be due and owing from defendant Margaret A. Rix to P. D. Barnhard, the plaintiff in said action, upon certain promissory notes executed by said Margaret A. Rix to one John Horstman and others, and assigned to said plaintiff; also for merchandise sold and delivered by John Horstman & Co. to said Margaret A. Rix upon open accounts, which said accounts were assigned to plaintiff; that on said first day of June, 1886, a summons in due form was issued in said last-named action, and was thereafter, on the——day of June, 1886, served upon the defendant Alfred Rix, the husband of the defendant Margaret A. Rix, and thereafter, on the——day of June, 1886, served upon the defendant Margaret A. Rix, and said defendants have appeared to said action in said court; that on the first day of June, 1886, a writ of attachment in due form was issued in said last-named action after the issuance of summons therein, and was placed in the hands of the defendant as sheriff as aforesaid; that on or about date, and in pursuance of the commands of said writ, this defendant, as sheriff, levied said writ of attachment upon the property described in the plaintiff's complaint, and placed a keeper in charge of said property, and still holds the same under and by virtue of said writ of attachment, and in no other manner; that at the date of the levy of said writ of attachment this defendant was the duly elected, qualified, and acting sheriff of the city and county of San Francisco, and the property levied on, as this defendant is informed and believes, was and is the property of the defendant Margaret A. Rix, and subject to seizure by virtue of said

attachment; that this defendant has never removed any portion of the property described in plaintiff's complaint from the Colonnade House, but has placed a keeper in charge of said property in said house, and allowed the said Margaret A. Rix to use said property, subject to the control of said keeper; that this defendant now holds said property as sheriff to satisfy any judgment which may be recovered in said action of Barnhard against Rix."

The following are the findings of the superior court:—

"1. That the plaintiff was not, on the twentieth day of June, 1886, nor at any time prior to the commencement of this action, the owner or entitled to the possession of all or any of the household furniture described in this complaint. The defendant, on or about said twentieth day of June, 1886, took said furniture in the manner hereinafter stated; and the plaintiff thereafter made a demand upon the defendant for the surrender and delivery of said furniture; and the defendant then and at all times refused to surrender and deliver the same to plaintiff; 2. That all the allegations of subdivision 2 of the defendant's answer are true; that the defendant seized and holds the property described in plaintiff's complaint under the circumstances and for the purposes stated in said subdivision 2. As conclusions of law, I find the defendant entitled to judgment for his costs of suit, and to be dismissed hence without delay.

"Signed December 29, 1887.

"JAMES G. MAGUIRE, Judge."

1. The judgment is not erroneous for want of an express finding on the issue of value and damage. There could be no finding of damage, because the effect of the findings made is, that there was no damage, and the value of the goods is of no consequence. Whether it was three thousand or twenty thousand dollars could make no possible difference in the result. Under the facts found, no additional finding as to value could have prevented a judgment for the defendant for costs; and it has been frequently held in this court that the failure to pass upon an issue which has thus become immaterial

terial is not error, or at least, that it is not a prejudicial error. (*McCourtney v. Fortune*, 57 Cal. 619; *Dyer v. Brogan*, 70 Cal. 139; *Malone v. County of Del Norte*, 77 Cal. 217; *Robinson v. Railroad Co.*, 65 Cal. 263; *Brisson v. Brisson*, 90 Cal. 323.) Many other decisions to the same effect might be cited. Notwithstanding these decisions, it is contended by appellant, or seems to be, that an omission to find upon all the issues in the case is prejudicial error, because it deprives him of the advantages which it was the purpose of the statute (Code Civ. Proc. secs. 632, 633) to secure, viz., a final adjudication upon each separate issue, to serve as a basis for a final judgment by this court on the appeal. But we do not see how this court could ever in any case render a final judgment for the appellant, however full and specific the findings might be, if a finding on one or more of the issues compelled a judgment for the respondent regardless of the others. As to the claim that the parties have a right to a finding upon every specific issue in a case, in order that they may plead it as *res adjudicata* in some possible future controversy where it may become material, although it is not so with regard to the matter being litigated, we do not think it was any part of the purpose of the statute to secure such a dubious advantage.

2. No question was raised in the superior court, either by demurrer to the answer or by objection to evidence, as to the sufficiency in form and substance of the defendant's plea of justification under the attachment; and conceding, without deciding, that if such an objection had been made it would have been necessary for the defendant to amend his answer, we are bound to hold, in accordance with our settled rule, that where, as in this case, the trial has been conducted in the superior court upon the assumption of all parties that a plea is sufficient, it cannot be objected to for the first time when the case is here on appeal. The judgment, therefore, must be affirmed.

The principal question in the case, however, arises

upon the appeal from the order denying the plaintiff's motion for a new trial. He contends, in support of this branch of the appeal, that the first finding of the court is contrary to the evidence. In other words, he contends that from all the evidence in the case it clearly appears that the furniture in controversy belonged to Alfred Rix, the husband of Mrs. Margaret A. Rix, in June, 1884, at which date it was transferred to the plaintiff by a bill of sale executed by Mrs. Rix, in the name of her husband as his attorney in fact, and that it has ever since remained the property of the plaintiff. In addition to the findings of the superior court above quoted, there is contained in the record an opinion of the judge in which the grounds of his decision are set forth more specifically and more at large, and in which he discusses several matters not involved in the findings, as, for instance, the effect of the conduct of Alfred Rix as an estoppel, the effect of an existing lease of the furniture upon plaintiff's right of possession at the date of the seizure, and of the commencement of the action, etc. A great deal of space is devoted in the briefs of counsel to a discussion of these questions, and of points of practice and pleading to which they give rise. We think, however, that they are wholly immaterial. The question, and the only question, to be decided is this: Does the evidence support the findings that the plaintiff was never the owner of the furniture, and that Mrs. Margaret A. Rix, at the date of the levy of the attachment in the suit of her creditors, was the sole owner? If it does, the order must be affirmed; and if it does not, the order must be reversed, irrespective of the reasons contained in the opinion of the judge.

The evidence shows that Alfred and Margaret A. Rix were married in 1858, and took up their residence in a house belonging to the husband on Pine Street, near Powell. At the date of the marriage the wife had no property, but shortly thereafter her husband gave her some lots at the Mission, which she subsequently sold. With the proceeds she purchased a vacant lot adjoining

the family residence, upon which her husband erected a large house, containing about thirty rooms, which she used as a boarding and lodging house. Subsequently, she rented and disposed of several other boarding or lodging houses in succession before taking the Colonnade. She always, however, kept up the Pine Street house, leaving it in the personal charge of her niece when she was compelled to be at the other places. How she managed to furnish these various houses, whether by the aid of her husband or upon her own credit, does not distinctly appear, but it is very clearly shown that her husband had nothing to do with the business, either actually or ostensibly. It was always spoken of as her business, and both by his words and his whole course of conduct, Mr. Rix distinctly repudiated any concern in it, or any responsibility for its debts. In 1870 he was called to New York on business, and during the ensuing four years was there a large portion of the time. From 1874 to 1883 he was there all the time, with the exception of a few flying visits to California. During all of this time Mrs. Rix was carrying on her business in San Francisco, a business with which her husband would have nothing to do, and which he was constantly advising her to give up. He made her an allowance of four hundred dollars a month, apparently for the support of herself and children, but seems never to have directed any particular application of it. She apparently mingled the receipts of her business and her husband's allowance, and expended both in supporting herself and children and in keeping up the business. The circumstances and the acts and declarations of both parties indicate that this was known by and at least tacitly consented to by her husband. The result was, that in 1883, her husband still being in New York, she had the Colonnade, a large house of one hundred rooms, fully furnished, where she was keeping a boarding and lodging house, and the Pine Street house, where her niece was in charge. But she had incurred debts, and being pressed for money, tried to obtain it from the plaintiff.

She offered to sell him the furniture of the Colonnade, presumably upon some such terms as were subsequently made in the name of her husband, but the plaintiff would not purchase from her. Acting under advice of counsel, he required a bill of sale from her husband. She accordingly obtained from her husband some sort of an authorization to sell, the terms of which, the writing having been lost, are not very clearly proven. Whatever they were, however, the power of attorney was executed by Mr. Rix, as a matter of form, as he expressed it; or rather, as the evidence indicates, for the mere purpose of satisfying the plaintiff. It is perfectly evident that in spite of the power of attorney and the form of the transaction, Mrs. Rix all the time claimed the furniture and the right to dispose of it, and that Mr. Rix never did claim it, or any part of its proceeds. After obtaining written authority from her husband, Mrs. Rix executed and delivered a bill of sale of the Colonnade furniture in her husband's name to the plaintiff, receiving therefor the sum of three thousand dollars. At the same time the plaintiff gave her a lease of the furniture for two years, which was subsequently renewed for another term of two years, at a rent of forty dollars per month, stipulating that she might purchase the furniture at any time within the term for four thousand dollars. There was no delivery or change of possession of the furniture. The plaintiff lodged in the Colonnade for a few months, as others did, but it is not seriously claimed that this circumstance was sufficient to work a change of possession. There was not the slightest outward or visible change in the condition of the property, nor did any occur up to the date of the levy of the attachment. Such being the facts disclosed by the evidence, we think they sustain the finding of the court that the furniture of the Colonnade was the separate property of Mrs. Margaret A. Rix.

To begin with, she owned the Pine Street house and lot, where she carried on a business which was hers exclusively, and in which her husband refused to have any

part. The proceeds of such business were, therefore, her separate estate, as being the profits of her separate property. (Civ. Code, sec. 162.) It is true that they may have been, to some extent, the profits of her labor and personal attention, but so must, in some degree, be the rents, issues, and profits of any separate estate of either spouse, and the wife must have the same right to manage her separate estate, so as to turn it to profit, that the husband has to manage his separate estate. The proceeds of the business, therefore, belonged to her. What these amounted to and how they were expended does not appear, and neither is it shown how the Pine Street house was furnished. But the whole course of conduct of both husband and wife for years, and all their declarations, go to show that she managed the boarding-houses, bought and sold and exchanged furniture just as she pleased, and in her own name, with her husband's full knowledge, and without any objection on his part, except his objection to her engaging in a business at all, which he considered unprofitable and injurious to her health.

As to the furniture in question, these circumstances, we think, are more than sufficient to overcome the presumption which ordinarily obtains, that any property purchased by either spouse after marriage is community property. Even if it appeared that some of the furniture originally put in the Pine Street house was bought and paid for by Mr. Rix, the subsequent conduct and declarations of the parties would warrant the inference that it was a gift to his wife. And if, with his knowledge and express or tacit consent, she used some portion of her monthly allowance to pay bills incurred in her business, that also would, as between themselves at least, be regarded and treated as a gift. To what extent creditors of the husband could call in question such transfers to the wife, or how far they could resort to the proceeds of a business, carried on as this was, in disregard of the provisions of the statute relating to sole traders, is a question which does not arise in this case; the only

questions here being as to how property acquired after marriage may, as between husband and wife, become the separate property of the latter. There is no doubt that it may become so by gift, and we think that so far as any property originally belonging to this community was mingled with the profits of Mrs. Rix's separate estate, the evidence fully warrants the conclusion that it was so mingled with the husband's knowledge and consent, and with the intention that it should be hers to use, control, and alienate at her pleasure. Indeed, neither the husband nor wife makes any claim to the contrary in any part of their evidence. All this the plaintiff knew, or might easily have ascertained (and there were abundant facts within his knowledge to put him upon inquiry), before purchasing the property; but he neglected to avail himself of the knowledge which he had or might have had. The result is, that he has no title to the furniture by the transfer from Alfred Rix. As against Mrs. Rix, his title would probably be good by estoppel; but as against her attaching creditors, it is wholly invalid for want of delivery and change of possession.

The judgment and order of the superior court are affirmed.

[No. 14665. Department Two. — July 22, 1892.]

A. KLAUBER ET AL., APPELLANTS, v. THE SAN DIEGO STREET-CAR COMPANY, RESPONDENT.

CONTRACT OF STREET-RAILWAY COMPANY TO RUN TRAINS — FORFEITURE OF EXTENSION — EXCUSE FOR NON-PERFORMANCE — FORECLOSURE OF MORTGAGE — RECEIVER — INJUNCTION. — The performance by a street-railway company of its contract to run regular trains each day for a period of ten years, under penalty of forfeiting an extension of its road, to be conveyed upon demand, is not excused because of the bringing of a suit by a mortgagee to foreclosure a mortgage upon the street-railway, and the appointment of a receiver to take possession thereof, who failed and ceased to operate the road, the street-railway company being enjoined from interfering with the possession and control of the road.

1B. — PERFORMANCE OF CONTRACT — INTERFERENCE BY WRIT — SUIT BY PRIVATE LITIGANT — PREVENTION BY OPERATION OF LAW. — The inter-
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ference by a writ sued out by a private litigant will not excuse the performance of a contract, although it may deprive the contracting party of the means of performance; and such interference is not a prevention by operation of law.

- 1D. — **CONTROL OF ACTS OF THIRD PARTIES.** — The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract.
- 1D. — **IMPOSSIBILITY OF PERFORMANCE.** — The impossibility of performance which will excuse the performance of a contract by the parties thereto must consist in the nature of the thing to be done, and not in the inability of the parties to it. If the thing can be accomplished by any one with proper means and the requisite skill and knowledge, the promisor is not less answerable because it is impossible to him.
- 1D. — **POSSESSION OF RECEIVER.** — **CONVEYANCE BY MORTGAGEES UPON BREACH OF CONDITION.** — A conveyance by a railroad company of a portion of its property to parties with whom it had contracted to convey such portion upon the breach of a condition cannot disturb the possession of a receiver appointed by the court, in an action against the company for the foreclosure of a mortgage, or embarrass him in the discharge of his duties.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

Parrish, Mossholder & Lewis, and Luce & McDonald, for Appellants.

The commencement of an action to foreclose the mortgage given by defendant, and the appointment of a receiver therein, and the possession and control of the road being turned over to such receiver, is not a sufficient legal excuse for the non-performance of the contracts on the part of the defendant, as it is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. (*Ingle v. Jones*, 2 Wall. 1; Civ. Code, sec. 1511; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Harriman v. Emerick*, 9 Wall. 161; *Walker v. Tucker*, 70 Ill. 543; 1 Wharton on Contracts, sec. 393; *McGehee v. Hill*, 4 Port. 170; 29 Am. Dec. 277; *Reid v. Edwards*,

7 Port. 508; 31 Am. Dec. 720.) The title to property in the hands of a receiver may be litigated in the courts so long as the possession of the receiver is not interfered with. (*Hickok v. Elliott*, 27 Fed. Rep. 830; *Andrews v. Smith*, 5 Fed. Rep. 833; *Calhoun v. Lanauux*, 8 Sup. Ct. Rep. 1345.) It is certainly not against conscience for the court to assist the plaintiffs in enforcing the specific performance of said contracts. That a court of equity will enforce the performance of such contracts, see the following authorities: Civ. Code, sec. 1671; 1 Pomeroy's Eq. Jur., secs. 433-440; 2 Story's Eq. Jur., secs. 1318-1320; *Muldoon v. Lynch*, 66 Cal. 536; *Fisk v. Fowler*, 10 Cal. 513; *Streeter v. Rush*, 25 Cal. 68.

Works, Gibson & Titus, and Works & Works, for Respondent.

It is a well-settled rule that an act agreed to be done, and which has subsequently become unlawful, is excused on the ground that no one can be required to do an unlawful act. (2 Parsons on Contracts, 7th ed., 674.) And there can be no difference between such a case and one where the act has been enjoined by a competent court. To do the act against the prohibition of the writ of injunction would be illegal, and a direct and criminal violation of the law.

TEMPLE, C. — This appeal is upon the judgment roll, and was taken by plaintiffs.

The findings show that defendant owned and was operating a street-railway in San Diego, and plaintiffs were the owners of certain lands, to which they desired to have the street-railway extended. On September 30, 1887, they therefore agreed with defendant, in consideration that it would build and operate the road in a specified way, that they would procure the right of way between certain named points, and the franchise from the city permitting the use of the streets, and a grant of the right of way over the city lands, and pay defendant \$6,000 per mile of such extension, and also pay for all

material and labor necessary to construct all of the bridges, trestles, and culverts along the line of the road; that plaintiffs performed their part of the contract, procuring and turning over to defendant franchises and rights of way worth \$10,000, and paid for building all the bridges, trestles, and culverts, \$22,000, and the further sum of \$41,695.88, being \$6,000 per mile for each mile of such extension; that the railway and franchises were worth only \$25,000, and plaintiffs have been benefited by its construction and operation in the sum of \$5,000 only; that it was provided in the contracts that after the construction and equipment of the road, if the defendant refused or failed to operate it as provided, and run over it three regular trains each and every day, for a period of ten years, that upon such failure, defendant should forfeit to plaintiffs the entire extension, including the franchise, rights of way, ties, rails, road-bed, bridges, trestles, and culverts, and the same should revert to and become the property of plaintiffs, and that the said defendant should convey all of said roads, including the franchises, rights of way, ties, rails, road-bed, bridges, trestles, and culverts, to plaintiffs, and should execute and give a sufficient deed of conveyance to plaintiffs for all defendant's right, title, and interest therein; that defendant constructed and operated the road according to the terms of the contract, until on or about February 19, 1889, at which time a suit was commenced by a certain bank to foreclose a mortgage upon the property, real and personal, of defendant, in the circuit court of the United States; that the mortgage was executed by defendant to the bank to secure the sum of \$250,000; that such suit was pending when this action was commenced, and is still pending; that on the nineteenth day of February, 1889, the said circuit court, by its order duly made, appointed a receiver of all the goods, property, estate, and effects of defendant, who duly qualified, and on that day took possession of all the property last mentioned, and has ever since maintained such possession; that all the property in question here was in-

cluded in the property so taken; that the defendant did not fail to perform its contracts with the plaintiffs in any particular until the receiver took possession, but that the receiver failed and ceased to operate the road on the 25th of February, 1889; that by the order of said circuit court, defendant, its agents and servants, and all persons whomsoever, were restrained and enjoined from in any way interfering with the possession or control of the property, or from selling, transferring, conveying, leasing, or otherwise disposing of or encumbering any of said property; that due demand, before suit, was made for the conveyance, etc., which was refused.

On these facts, were plaintiffs entitled to judgment? The trial court held that they were not, apparently for two reasons, both of which are urged here in support of the judgment: 1. Want of performance is excused because it was prevented by operation of law (Civ. Code, sec. 1511); and 2. The conveyance sought would interfere with the possession of the receiver and of the federal court.

No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract, although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is the act of an individual, and not of the government. In a certain sense, the property so taken may be in the custody of the law, and yet the seizure may be wrongful, and the suitor held responsible, as for a trespass, in damages. The law recognizes the fact that these private remedies may be wrongfully, that is illegally, used, and the litigant is required to give security for damage that may be caused if it should be finally decided that the writ was improperly issued. This cannot be called the operation of law within the meaning of the Civil Code.

The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract. (*People v. Bartlett*, 3 Hill, 570.)

Nor would it be a defense that the law has rendered it

difficult or very expensive to perform. The rule is, if performance is in itself possible, there is a breach although the obligor himself may have become wholly unable to perform. The suit to foreclose the mortgage against the property of defendant did not render performance impossible; defendant could have paid the claim or given security, and have had the receiver discharged.

"To warrant the application of the principle, the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or, as it is sometimes termed, be an *impossibilitas rei* as distinguished from an *impossibilitas facti*. If the thing could be accomplished by any one with proper means and the requisite skill and knowledge, the promisor was not less answerable because it was impossible to him." (Hare on Contracts, 639.)

"The principle deducible from the authorities is, that if what is agreed to be done is possible or lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance." (*The Harriman*, 9 Wall. 172.)

But it seems to me the very fact that the thing can be done, although it may be very expensive, to wit, it may require the defendant to liquidate and pay an unjust claim, shows that performance is not prevented by operation of law. It is not the law operating upon the facts which creates the difficulty, but the use of a judicial writ by a private litigant.

Suppose the receiver had been appointed after decree in favor of the mortgagee; it would be obvious the defendant could continue to operate the road by paying its debt.

So far as there is anything in the second point which is not included in the first, it is enough to say that a conveyance such as is sought here could not disturb the possession of the receiver, or embarrass him in the dis-

charge of his duties. (*Albany City Bank v. Schermerhorn*, 9 Paige, 372; 38 Am. Dec. 551.)

Even should it necessitate bringing in new parties in the foreclosure suit, or place the assignees in a position to intervene, there could be no objection on that ground, much less would it constitute a contempt of the mandate of the circuit court.

I think the judgment should be reversed, and a specific performance decreed on the findings.

BELCHER, C., and VANOLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and the superior court directed to enter a judgment upon the findings in favor of plaintiff, in accordance with the prayer of the complaint.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

[No. 14625. Department Two. — July 22, 1892.]

**CHARLOTTE CRESWELL ET AL., APPELLANTS, v.
WILLIAM H. WELCHMAN ET UX., RESPONDENTS.**

DEED BY AGED WOMAN TO NEPHEW — CONSIDERATION — PREVENTION OF SUPPORT — CANCELLATION. — Where a woman nearly seventy years of age, with no children or relatives in this state, made a deed reserving a life estate in herself, and granting a remainder in fee of her real estate to her nephew, who, at her request, came to this state from New Jersey, at his own expense, to live with her, take care of her, attend to her business, and improve her home, and make it more comfortable, in consideration of the deed, and it appears that she was, at the time of the making of the deed, of sound mind, and executed and delivered it voluntarily, in the absence of fraud or undue influence, and that the nephew and his wife in good faith came to this state to make their home with her, and cared for her, and spent four hundred dollars in repairing and enlarging the house, when she changed her mind, and would not permit them to remain, through no fault of theirs, and that after they left they offered to send her money if she needed it, or to return and rent the property, which offer she refused because she had remarried, the deed will not be set aside at suit of herself and husband.

APPEAL from a judgment of the Superior Court of Ventura County, and from an order denying a new trial.

The facts are stated in the opinion.

Blackstock & Shepherd, for Appellants.

Orestes Orr, and *Orr & Hall*, for Respondents.

BELOHEE, C. — In August, 1888, the plaintiff Charlotte Creswell, then Charlotte Bath, was left a widow by the death of her husband, Joseph Bath. She was then nearly seventy years of age, and had no children and no relatives in this state. She owned thirty-seven acres of farming land in the county of Ventura, on which she was living, and a lot in the town of Santa Paula, the whole being of the value of about four thousand dollars. At her request, the defendant William H. Welchman, who was her nephew, and was then residing in the state of New Jersey with his wife, the other defendant, came to this state to live with and take care of her. They arrived at her home about the 1st of February, 1889, and on the twelfth of that month she, for the expressed consideration of one dollar and other good and lawful considerations, executed and delivered to them a bargain and sale deed of all her real property, but "reserving and excepting unto the grantor herein, for her own use and benefit, a life estate in the whole of said lands hereby granted, for and during the natural life of said grantor, with the right to use, occupy, and control absolutely the said lands and tenements, and to receive, take, and have the rents, issues, and profits thereof so long as she, the said Charlotte Bath, grantor, may live."

The defendants continued to live with plaintiff until January, 1890, when they left her house and went away, claiming that they were compelled by her to do so.

On the day defendants left, John E. Creswell, a stranger to plaintiff, called at her house, and wanted work. She took him in and kept him till March 12th, when she married him.

On May 6, 1890, this action was commenced by Mrs. Creswell and her new husband to have the deed executed by her to defendants set aside and canceled, on

the grounds that it "was signed by plaintiff at the solicitations of defendants, and under undue influence exercised by them upon plaintiff, and with the intent and purpose on their part of cheating and defrauding plaintiff"; that the consideration for the conveyance had failed; "that said conveyance was made by plaintiff when of the age of seventy years, and when in feeble state of health, and when in great mental distress, and at a time when she did not know fully what she was doing, nor realize the effect upon her of the act, to wit, the execution of said deed"; and that the deed was fraudulent and void, and operated only as a cloud on her title.

The court below found that when the deed was made the plaintiff was "competent and had sufficient capacity to convey her estate; that she signed, executed, and delivered the said deed voluntarily, of her own will, without solicitation, and free from undue influence; that no fraud was committed or attempted upon her by defendants, or either of them, to obtain said deed; that the consideration of the deed was the relationship between the parties, and the coming of defendants from their home in the state of New Jersey to the home of plaintiff in California, "and the agreement on the part of said defendants, entered into with good faith by them, to make their home with said plaintiff, care for her, improve, repair, and make more comfortable and convenient her home, and attend to her business and affairs, and give her their companionship and society during the remainder of her lifetime"; that defendants came to California at an expense to themselves of two hundred dollars, and under plaintiff's direction "took full charge of her business and affairs, repaired and improved the dwelling-house, the home of plaintiff, on said tract of land, by building three new roofs thereto, at an expense to themselves of four hundred dollars, and made their home with said plaintiff, provided and cared for her, gave her their companionship and society, and did fully pay, yield, and render the consideration for said deed for the space of about eleven months, when they were compelled to

leave said premises and remove therefrom and give up the possession thereof, and to cease living with said plaintiff, caring for, or in any manner providing for or protecting her, or attending to her affairs, by the acts and directions of said plaintiff herself; that plaintiff at said time refused to allow them to do anything for her or to receive any aid from them, and demanded and received sole possession of said premises described in the complaint in this action, by virtue of the estate reserved unto herself in the said deed to the defendants"; that after defendants moved away, and before the commencement of this action, "they offered to return to the said home of plaintiff, or to send her money if she so desired, all of which offers of defendants said plaintiff rejected, and refused to accept; that defendants provided said plaintiff, during the whole of the time that she permitted them to reside with and care for her, with a good and comfortable home, and did in good faith in all things pay, yield, and render the consideration agreed upon for said deed, except as prevented by the acts of said plaintiff."

And as a conclusion of law, the court found that the deed was valid, and operated as a conveyance to the grantees in fee of the remainder, after the life estate reserved to the grantor, of all the lands and premises described in the deed, and that they were the owners thereof.

Judgment was accordingly entered that the plaintiffs take nothing by their action. From that judgment, and an order denying a new trial, the plaintiffs have appealed.

The only specifications found in the statement are that some of the findings were not justified by the evidence. But after carefully reading all of the evidence found in the transcript, we are of the opinion that it was amply sufficient to justify each of the findings. It is true that when the deed was made the grantor was an old lady and alone in the world. She wanted company and care, and had solicited the defendants to come and

live with her, offering to give them all that she had after her death. So far as appears, she was then of sound mind, and able to transact her business understandingly. She went to a lawyer to have him draw the deed, and presumably it was drawn at her dictation and as she wanted it.

The defendants came to this state at an expense of two hundred dollars, and afterwards expended four hundred dollars in repairing and enlarging the house. No offer was made to return any of this money to them. They appear to have acted in good faith, and to have intended to live with and take care of the old lady as long as she should live. That they were unable to do this was not their fault. They left because she had changed her mind and would not permit them to remain. She had reserved a life estate in the property, with a right to its possession, and they could only occupy it with her consent. The deed to them was absolute and without any conditions, but they could exercise no control over the property during her lifetime. After they left, they offered to send her money if she needed it, or to return and rent the farm, and she replied that she had rented the farm and herself with it; she had got married, and they need not trouble themselves about sending her any money. They seem, therefore, to have been fully justified in going and remaining away. And speaking of this action, it was proved that she had said she didn't care which party won it. "All she wanted was the property during her lifetime, and she had that."

Upon the facts shown, we think the court below was right in entering judgment as it did, and we advise that the judgment and order be affirmed.

HAYNES, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

Hearing in Bank denied.

[No. 14671. Department Two. — July 22, 1892.]

PETER WALL, APPELLANT, v. F. H. HEALD, RESPONDENT.

NOTICE OF OVERRULING OF DEMURRER — PRESENCE IN COURT — WAIVER OF WRITTEN NOTICE. — Written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party at the time of the ruling, and the time to amend or answer runs in such case from the time when the ruling is made.

ID. — DEFAULT JUDGMENT — AUTHORITY OF CLERK. — When a demurrer has been overruled and time given to answer, but no answer is filed within the time granted by the court to the defendant in which to answer, the clerk is authorized to enter a default judgment without an order of the court.

APPEAL from an order of the Superior Court of San Diego County vacating and setting aside a default judgment and recalling an execution.

The facts are stated in the opinion.

W. T. McNealy, Trippett & Neale, and *L. Gill*, for Appellant.

The records of the court show that the defendant had actual knowledge of the order of the court which constituted a waiver of written notice. (*Barron v. Deleval*, 58 Cal. 98; *O'Neil v. Donahue*, 57 Cal. 231; *Mullally v. Benevolent Society*, 69 Cal. 559; *Gray v. Winder*, 77 Cal. 525; *San Fernando H. Ass'n v. Porter*, 58 Cal. 81; *Dow v. Ross*, 90 Cal. 563; *People v. Center*, 9 Pac. C. L. J. 766; *Corbett v. Swift*, 6 Nev. 195; *Hunter v. Truckee Lodge*, 14 Nev. 24, 28; *Baron v. Anderson*, 15 Pac. Rep. 226, 229 (Kan.); *North Am. Coal Co. v. Dyett*, 4 Paige, 275; *Farley v. Farley*, 7 Paige, 40.) The clerk has a right to enter default and judgment after demurrer overruled and the time for answering had expired. (*Bailey v. Sloan*, 65 Cal. 388.) When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from service of notice of decision or order. (Code Civ. Proc., sec. 476.) Notice must be in writing. (Code Civ. Proc., sec. 1010.) A party intending to move for a new trial, after decision of court against him, has

a right to wait for a notice in writing of such decision; and he is entitled to such notice before he is called upon to act, although he is present in court when the decision is rendered, and waives findings, and asks for a stay of proceedings on the judgment. (*Biagi v. Howes*, 66 Cal. 471.) This is much the best rule. It is more certain and definite, prevents controversies which, under any other construction, would be likely to arise, and above all, accords, in our opinion, with the intention of those enacting the statute. (*Biagi v. Howes*, 66 Cal. 417; *Sawyer v. San Francisco*, 50 Cal. 375; *Roussin v. Stewart*, 33 Cal. 210; *Carpenter v. Thurston*, 30 Cal. 125; *Jenkins v. Wild*, 14 Wend. 545; *Fry v. Bennett*, 16 How. Pr. 402; *Staring v. Jones*, 13 How. Pr. 423; *Valton v. National Loan Society*, 19 How. Pr. 517; *Rankin v. Pine*, 4 Abb. Pr. 310; *Fry v. Bennett*, 7 Abb. Pr. 352; *Leavy v. Roberts*, 8 Abb. Pr. 310; *Matter of New York Central etc. R. R. Co.*, 60 N. Y. 114.)

E. W. Hendrick, D. N. & M. S. Hammack, and S. V. Landt, for Respondent.

The aggrieved party must either have had actual knowledge of the order or decision, or else waived notice of the same. If by notice, it must be in writing. (Code Civ. Proc., sec. 1010.) If it be by waiver, it should be by stipulation in writing, or entered in the minutes of the court. (Code Civ. Proc., sec. 283; *Peralta v. Mariea*, 3 Cal. 187; *Borkheim v. N. B. & M. Ins. Co.*, 38 Cal. 623.) The only provisions in the code in reference to the clerk's entry of default is in section 585 of the code of Civil Procedure. "The clerk can render judgment only in the precise cases designated by the statute." (*Olipphant v. Whitney*, 34 Cal. 27.) The clerk has no means of knowing what has been done beyond what is disclosed by his files, and the record made in the regular course of procedure. (*Olipphant v. Whitney*, 34 Cal. 27.)

BELCHER, C. — On the thirteenth day of January, 1891, this action was commenced in the superior court of San

Diego County, to recover the amount due on a promissory note. On the thirtieth day of the same month, a general demurrer to the complaint was filed, signed "E. W. Hendrick, attorney for defendant." On the 27th of February, the demurrer was overruled, the minute entry of the order being as follows: "Parties being present by their respective attorneys, the demurrer of defendant to plaintiff's complaint is at this time overruled for want of oral presentation, and ten days given defendant in which to answer." No written notice of this order was ever given to or served on the defendant or his attorney. On the 10th of March, no answer having been filed, the clerk of the court entered the default of the defendant, and a judgment against him as prayed for in the complaint. On the 9th of June, an execution was issued on the judgment and levied on the property of defendant. On the 24th of July, the defendant moved the court to set aside the default and judgment, and to recall the execution, on the ground that the default and judgment were entered, and the execution issued, without authority and in violation of law, because no notice of the order overruling his demurrer had been served on him or his attorney, or waived by him or his attorney, and because, when a demurrer has been overruled and time given to answer, the clerk has no authority to enter a default or judgment without an order of court directing him to do so. In support of his motion, the defendant offered and read in evidence the judgment roll in the case, and in opposition thereto, the plaintiff offered and read from the minutes of the court the order overruling the demurrer and an affidavit made by one Harry J. Neale. In this affidavit the affiant stated that he was one of the attorneys for the plaintiff in this case, and was present in court on the twenty-seventh day of February, 1891, which was the regular day for the call of the court's law and motion calendar, and that this case was upon the said calendar, pending upon the defendant's demurrer to the complaint; "that E. W. Hendrick, Esq., was and still is the attorney of record for the defendant herein,

and was present in court upon said day at the call of said calendar; that when said demurrer was called, affiant answered the same 'ready'; that when the said demurrer was called for argument, the said E. W. Hendrick stated to the court that he did not desire to argue the same, whereupon the court announced that the said demurrer was overruled for want of oral presentation; that said Hendrick then stated that the defendant would take the usual time to answer, or words to that effect, to which the court assented."

There was no attempt on the part of the defendant to deny any of the statements made in the affidavit, and after argument the matter was submitted to the court for decision.

The court thereupon made and entered its order vacating and setting aside the default and judgment, and recalling the execution; and from that order the plaintiff appeals.

Section 476 of the Code of Civil Procedure provides that "when a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order"; and section 1010 of the same code provides that "notice must be in writing." Respondent contends that under these sections the time allowed to answer does not begin to run until written notice of the order is given or waived, and that to constitute a waiver it must be evidenced by stipulation in writing or entry in the minutes of the court. The answer to this contention is, that this court has held otherwise.

In *Barron v. Deval*, 58 Cal. 95, a demurrer to the complaint was overruled, and five days allowed to answer. No notice in writing of the order was given. Eight days later, no answer having been filed, judgment by default was entered against the defendant. From that judgment the defendant appealed, and the only point made on the appeal was to the necessity of written notice. It was shown by the bill of exceptions that "the defendant was present in court by his attorney of record

upon argument and ruling on the demurrer, and upon the same being overruled, requested of the court time to answer, and five days' time to answer was granted." It was held that written notice was waived, and that judgment by default was rightfully entered after the expiration of the time allowed. The court said: "The object of the notice, and the only purpose it can subserve, is to bring home to the attorney knowledge of a fact upon which he is called upon to act. But the right to a written notice, like any other civil right, may be waived, and we think it was waived in this case. Section 3518 of the Civil Code provides that 'any one may waive the advantage of a law intended for his benefit.' Section 3528 of the same code provides that 'the law respects form less than substance,' and section 3532 declares that 'the law neither does nor requires idle acts.' . . . What purpose would a written notice of a fact of which the attorney had direct and positive knowledge have subserved? Would it not have been a vain and idle ceremony to have given him a written notice under the circumstances disclosed in this case? . . . To hold that the party and his attorney were not bound by this proceeding, had in open court, would be trifling with justice, and also subversive of sound principles of law and morals." (And see *Mullally v. Benevolent Society*, 69 Cal. 559; *Gray v. Winder*, 77 Cal. 525; *Dow v. Ross*, 90 Cal. 562.)

It is shown by the order of the court, and by the uncontradicted affidavit of plaintiff's attorney, that the defendant was present in court by his attorney when his demurrer was overruled, and knew of and acted upon the order. He must therefore be held, under the decision above cited, to have waived written notice of the order.

As to the point that the clerk had no authority to enter the default and judgment without an order of court, a sufficient answer is found in *Bailey v. Sloan*, 65 Cal. 387, where it is said: "No answer was filed, and the time within which the defendant was granted leave to

answer having expired, the clerk was authorized to enter his default, and a judgment for the amount specified in the summons."

It follows, in our opinion, that the order appealed from should be reversed.

VANOLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is reversed.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

[No. 14714. Department Two. — July 22, 1892.]

BARBARA CHILDS, RESPONDENT, v. F. D. LANTERMAN ET AL., APPELLANTS.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DISCRETION — REVIEW UPON APPEAL. — A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its action in refusing the motion will not be disturbed upon appeal, where the appellate court cannot say, upon the record before it, that if a new trial were had, and the newly discovered evidence were produced, the result would be different.

ID. — QUESTION OF BOUNDARY — CONFLICTING EVIDENCE — CONTRADICTING FIELD-NOTES OF SURVEY. — The refusal of the trial court to grant a new trial upon the ground of newly discovered evidence will not be reversed upon appeal, where it appears that the question at issue was one of boundary of land, upon which the evidence was substantially conflicting, and the newly discovered evidence fixes the location of the stations of a survey on the east side of an arroyo, in contradiction of the field-notes of the survey, which described them as being on the west side of the arroyo, and which were confirmed by other evidence adduced upon the trial, and by counter-affidavits used upon the hearing of the motion.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Stephen M. White, for Appellants.

Gould & Stanford, for Respondent.

XCV. CAL.—24

DE HAVEN, J.—Action to quiet title, and the defendants appeal from a judgment in favor of plaintiff, and from an order denying their motion for a new trial.

The real question in issue between the parties is one of boundary, the appellants claiming that the land described in the complaint lies within the boundaries of the rancho La Canada, while the respondent contends that it does not. The evidence upon the point was conflicting, and this being so, we cannot, under the rule which is well settled in this court, disturb the finding of the trial court.

But it is urged by appellants that their motion for a new trial should have been granted on the ground of newly discovered evidence. The nature of this new evidence is made to appear by the affidavit of one Coronel, who assisted in making the survey of the rancho La Canada, and who was not a witness upon the trial. In his affidavit, as we understand it, he states in substance that stations 87 and 88 of that survey were in point of fact located farther north than as found by the court, and so as to include within said rancho the whole or a portion of the premises in controversy, and that station 87 is marked by a rock mound now in place, and the east bank of an arroyo referred to in the field-notes of said survey. The field-notes of the survey, however, state that the station is on the west bank of the arroyo.

A motion for a new trial upon the ground of newly discovered evidence is one which is addressed to the sound discretion of the trial court, and we cannot say, upon the record before us, that the court did not properly exercise its discretion in denying the motion of appellants, as it cannot be said that if a new trial were had, and the testimony of this witness produced, that the result would be different. To accept his statement as to the location of station 87, the court would have to so far disregard the field-notes of the survey upon which the patent for the rancho La Canada is based as to place that station on the east instead of the west side of a deep arroyo, which is a permanent landmark referred to in

such field-notes. Considering the long time which has elapsed since the making of the survey, and the other evidence given upon the trial tending to show the true location of the lines of that survey, as well as the counter-affidavit used on the hearing of the motion, it cannot be said that the court, in passing on the motion for a new trial, erred in accepting the field-notes of such survey as the best evidence in determining whether the station was located on the east or west bank of the arroyo mentioned in such field-notes, and if the court disregarded the affidavit of Coronel as to the location of station 87, it might well have concluded not to accept his statement in regard to the location of station 88.

Judgment and order affirmed.

SHARPSTEIN, J., and McFARLAND, J., concurred.

[No. 20917. Department One. — July 23, 1892.]

THE PEOPLE, RESPONDENT, v. GEORGE W. FRENCH,
APPELLANT.

CRIMINAL LAW — LARCENY — EVIDENCE — IRRELEVANT STATEMENTS—CROSS-EXAMINATION — OBJECTIONS — MOTION TO STRIKE OUT. — The fact that a witness, upon the trial of a defendant charged with the larceny of cattle, made irrelevant statements in his examination in chief as to the acts of the defendant with reference to other cattle, does not give the defendant the right to enter into a cross-examination upon such matters. The remedy of the defendant is to object to the questions, if such were asked, and if the statements were volunteered, a motion to strike out should be made.

ID. — TIME NOT OF ESSENCE OF OFFENSE — ALIBI — INSTRUCTIONS. — Where a defendant was charged with feloniously stealing and driving away cattle "on or about the twentieth day of November, 1890," and his defense was an alibi, an instruction to the jury to convict if they believed from the evidence, to a moral certainty, that the defendant stole, or aided in stealing, the cattle named in the information, although they might not believe that it was done on the 20th of November, 1890, but within a few days from that time, is proper, and does not deprive the defendant of the defense of alibi.

APPEAL from a judgment of the Superior Court of Butte County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

McGee & Reardon, for Appellant.

Attorney-General Hart, for Respondent.

GAROUTTE, J. — The appellant, French, was convicted of the crime of grand larceny, and appeals from the judgment and order denying his motion for a new trial.

The court very properly sustained an objection to the question, "When was it you drove them there?" The interrogatory did not refer to the cattle which the defendant was charged with stealing, and was wholly irrelevant to the issue upon trial. The fact that the witness in his examination in chief made statements as to the acts of the defendant with reference to certain other cattle, which, as far as the record discloses, were statements volunteered by him, does not give appellant the right to enter into a cross-examination upon such matters. The subject-matter of examination was foreign to the issue, and appellant's remedy was an objection to the questions, if such were asked; and if the statements were volunteered, then a motion to strike out would have subserved all purposes.

The court gave the jury the following instruction: "The essence of the crime charged in this information is 'feloniously stealing and driving away the cattle.' This is charged to have been done on or about the 20th of November, 1890. You will see that the precise day on which it took place is not given. 'On or about' are the words of the information; and I instruct you that if you believe from the evidence in this case, beyond a reasonable doubt and to a moral certainty, that the defendant stole, or aided in stealing, the cattle named in the information, though you may not believe that it was done on the twentieth day of November, but within a few days of that time, then your verdict should be 'Guilty.' For the law looks to the crime committed, and not to the precise day when it was done, if done be-

for the filing of the information, and within a reasonable time of the day named. This is the law in all cases, except when time is of the essence of the crime charged, and, as I said before, time is not of the essence of the crime in this case."

Appellant's defense was an *alibi*, and while with argument he attacks the principle embodied in the foregoing instruction, no authority is cited in its support. Two witnesses claiming to be *particeps criminis* with appellant in the commission of the larceny testified that in company with him they took possession of and drove away the cattle upon the twentieth day of November. Other parties testified they saw appellant in possession of the cattle a day or two later in an adjoining county. Appellant's evidence tended strongly to show that he was in the town of Gridley upon the twentieth day of November, a town situate several miles distant from the scene of the alleged larceny. Upon this state of facts, the instruction expressed the law, and we are unable to see how the giving of it in any manner infringed upon the rights of appellant. As the court said, the exact date of the commission of the crime was immaterial. The material fact was, did the appellant commit the larceny? He was not deprived of the effect of his evidence upon the question of *alibi* by the instruction of the court. It was before the jury for all that it was worth, and no doubt was fully weighed by the jurors in arriving at a verdict. If it had sufficient force, it overthrew the statements of his confederates as to the date of the larceny, and overthrowing their testimony in this regard would naturally weaken it as to the main issue, but all those matters came before the jury and were duly considered. We will suppose that appellant's evidence established beyond a doubt his presence in the town of Gridley during the entire day of November 20th; such fact would not have authorized the court to advise the jury to acquit by reason of an *alibi*. Again, if the evidence in this case had indicated appellant's guilt to a moral certainty, and conceding his *alibi* to have been proven as attempted,

certainly his acquittal would not have followed from such conditions. A complete and perfect *alibi* establishes as a fact that a party did not commit the offense charged; but the *alibi* attempted to be shown in this case, if it had been successfully established, would have entirely failed to meet such requirement of the law.

For the foregoing reasons, the judgment and order are affirmed.

PATERSON, J., and HARRISON, J., concurred.

[No. 20916. In Chambers. — July 23, 1892.]

EX PARTE ROBERT GORDAN, ON HABEAS CORPUS.

DIVORCE — JURISDICTION OF SUPERIOR COURT — CARE AND CUSTODY OF MINOR CHILDREN — PLEADING. — In an action for a divorce, the superior court has jurisdiction, under section 188 of the Civil Code, to make such orders for the custody and maintenance of minor children of the marriage as may seem to be necessary, although the pleadings contain no specific allegations as to the fitness of the respective parties, or their ability or willingness to care for their offspring, nor any prayer respecting the custody thereof.

ID. — ORDER AWARDING CHILD TO GRANDMOTHER — APPOINTMENT OF GUARDIAN. — It is no objection to the validity of an order in such action, awarding the custody of a minor child of the parties to its grandmother at the expense of the husband, that there were no proceedings under sections 1747 et seq. of the Code of Civil Procedure, prescribing the proceedings for the appointment of guardians generally.

ID. — ORDER FOR PAYMENTS TO AGENT OF COURT — JUDGMENT — PARTIES. — Where, by order of the court, in an action for divorce, the custody of the child of the marriage has been awarded to its grandmother, a further order that the father pay to the grandmother a monthly allowance for the support of the child is an order for the payment of money to an agent or officer of the court charged with the duty of carrying its decree into effect, and is not void as being a judgment in favor of a stranger to the action.

ID. — POWER OF COURT — SUPPORT OF CHILD BY FATHER. — The power of the court, in an action for a divorce, to compel the father to support his minor child does not depend wholly upon section 139 of the Civil Code; and whether he is with or without fault in the matters involved in the action, it is his duty to support such child, and the court may compel him to do so, though the child is given to the custody of a stranger to the action.

ID. — WIFE'S FORFEITURE OF SUPPORT — RIGHTS OF CHILDREN. — Although a wife, by her fault in the matters involved in an action for a divorce,

may forfeit her own claim to be supported by her husband, she cannot forfeit the claims of their children to such support.

IN. — MISNOMER OF CHILD — IDENTIFICATION. — An order that the husband pay a monthly allowance for the support of a minor child designated as "Lima" or "Lena" Gordan is not void as being an order for the support of a different person from "Leah" Gordan, though the names are not referred to throughout the proceedings as the sole issue of the parties to the action, and is thereby identified.

IN. — CONTEMPT — REFUSAL TO OBEY ORDER FOR. — The refusal of the husband to pay money for the support of a minor child, which the court, in an action for divorce, has ordered to be paid to its grandmother, to whom the custody of the child was awarded, is a contempt of court, punishable by imprisonment until the money is paid, if the husband is found to have the ability to do so.

APPLICATION to the Supreme Court for a discharge from imprisonment upon a writ of *habeas corpus*. The facts are stated in the opinion of Chief Justice Beatty.

James G. Maguire, Maguire & Gallagher, and J. D. Sullivan, for Petitioner.

Henry I. Kowalsky, and T. J. Crowley, contra.

BEATTY, C. J. — In December, 1887, the prisoner obtained a decree of divorce from his wife, Elka Gordan, on the ground of desertion. In his complaint for a divorce, he alleged that the issue of his marriage with Elka Gordan was one female child, born August, 1885. He did not state the name of the child, nor did he allege any facts showing his fitness or his wife's unfitness to have her custody. The answer of Elka Gordan admitted the marriage, but denied generally all other allegations of the complaint, including of course the existence of the child. Neither party prayed for her custody, though the complaint contained a prayer for general relief. The court, by its judgment granting the divorce, further ordered and decreed: "That the custody of the child of said marriage, to wit, Leah Gordan, aged two years old, be, until the further order of this court, placed in the charge and custody of the grandmother, Sarah Patek, to be by her cared for and sustained at the expense of plaintiff, Robert Gordan, in the city and county of San

Francisco, California, and shall not be removed therefrom until further order of this court, or by consent of both parties, plaintiff and defendant."

It appears from the evidence that this provision of the decree was inserted in pursuance of an agreement of the parties, by which the plaintiff promised to pay for the support of the child the sum of twenty-five dollars per month. This agreement he performed punctually up to the month of December, 1889, when he refused to make any further payments. In January, 1890, Sarah Patek obtained a rule from the superior court commanding the plaintiff to show cause why he should not be required to pay forty dollars per month for the support of the child, and on the 25th of January, 1890, upon the hearing of the rule, an order was made in the action of *Gordan v. Gordan*, requiring Robert Gordan to pay to Sarah Patek, at her residence in San Francisco, the sum of thirty dollars per month for the support of said child, designated in these proceedings as Lina or Lena Gordan. This order was complied with up to January, 1891, since which time the plaintiff has refused to make any further payments. In consequence of such refusal, several proceedings have been instituted against him, one of which is reviewed in *Ex parte Gordan*, 92 Cal. 478. After the decision in that case, plaintiff was again, in February, 1892, cited to show cause why he should not be punished for contempt of court in refusing to obey the order of January 25, 1890. In response to this order he appeared by counsel, and the court, after a full hearing, adjudged him guilty of the contempt charged, and ordered him to be imprisoned in the county jail until he paid the amount due and unpaid under said order of January 25, 1890. Upon this order, a warrant was issued, under which the plaintiff was imprisoned by the sheriff of Solano County, and thereupon this proceeding was instituted for the purpose of securing his discharge from custody.

Four objections are made to the validity of the commitment: 1. That under the pleadings in *Gordan v. Gordan*, the court had no jurisdiction to award the custody of

Leah Gordan to Sarah Patek; 2. That the court had no jurisdiction to order the plaintiff to pay money to Sarah Patek, a stranger to the action; 3. That the order of January 25, 1890, is to pay money for the support of Lina Gordan, a different person from Leah Gordan; 4. That it is a violation of the constitution to enforce this order by imprisonment.

As to the first point, I think section 138 of the Civil Code gave the court jurisdiction to make a proper order for the custody of the child. Its jurisdiction did not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness to care for their offspring, nor upon a specific prayer for the custody. The pleadings would seem to indicate that one of the parties was oblivious of the child's existence, and that both were indifferent as to what should become of her; but this did not prevent the court from taking care of her interests. On the contrary, it furnished a good ground for the order that was made. Nor is it any objection to the validity of the order that there were no proceedings under sections 1747 et seq. of the Code of Civil Procedure. Those sections prescribe the proceedings for the appointment of guardians generally, and afford one means of acquiring jurisdiction to dispose of the custody of minors, but they are not exclusive. In actions, for divorce, the court may always make such orders for the custody and maintenance of minor children of the marriage as may seem to be necessary. (Civ. Code, sec. 138.)

2. The order of January 25, 1890, was not a judgment in favor of a stranger. It was an order for the payment of money to an agent or officer of the court, charged with the duty of carrying its decree into effect. The decision in *Sharon v. Sharon*, 75 Cal. 38, 39, has no application. The power to compel the father to support his minor child does not depend wholly upon section 139 of the Civil Code. Whether he is with or without fault in the matters involved in the divorce suit, it is primarily his duty to support his minor children. (Civ. Code, secs.

196, 197.) The wife, by her fault, may forfeit her own claim to be supported by her husband, but she cannot forfeit the claims of their children.

3. The names Lena or Lina Gordan and Leah Gordan are not the same, nor are they *idem sonans*, but it happens that the child so variously designated is sufficiently identified throughout these proceedings by other terms of description, e. g., the sole issue of the marriage of Robert and Elka Gordan.

4. The last objection is the most serious of all, and if the question were a new one, I should hesitate to decide that payment in this case can be enforced by imprisonment, but I can see no distinction in principle between orders for the payment of alimony to the wife and orders to pay money for the support of minor children; and it is settled in this state that refusal to pay alimony is a contempt of court punishable by imprisonment, or, what is the same thing in effect, that a party found to have the ability to pay may be imprisoned until he obeys. (*Ex parte Perkins*, 18 Cal. 60; *Ex parte Cottrell*, 59 Cal. 417.)

I see nothing unlawful in the imprisonment. The writ is discharged, and the prisoner remanded.

[No. 14858. Department One. — July 23, 1892.]

THE CITY OF SANTA BARBARA, RESPONDENT, v.
A. ELDRED, APPELLANT.

ACTION FOR TAXES — ISSUE AS TO LEGALITY — TRANSFER FROM POLICE COURT TO SUPERIOR COURT — CONSTRUCTION OF CODE. — In an action brought in a police court to recover taxes, where the answer raises an issue as to the legality of the tax sought to be recovered, it is the duty of the court to transfer the action to the superior court for trial, under the provisions of section 838 of the Code of Civil Procedure, which applies to police courts as well as to justices' courts.

ID. — VOID JUDGMENT OF POLICE COURT — APPELLATE JURISDICTION. — Where the verified answer in such action discloses facts which require a transfer of the cause to the superior court, from the time of the filing of the answer the police court is ousted of its jurisdiction to proceed further upon the merits presented by the pleadings, and a judgment rendered therein is void, and the superior court has no appellate jurisdiction to try the case.

ID. — ORIGINAL JURISDICTION OF SUPERIOR COURT — TRIAL OF APPEAL UPON MERITS — WAIVER OF IRREGULARITY. — The superior court has original jurisdiction in matters involving the legality of a tax, and over an action to recover a tax, the legality of which is put in issue; and where the parties proceed to trial upon the merits in such an action appealed from the police court to the superior court, over which the superior court has no appellate jurisdiction, its original jurisdiction is not affected by the irregular way in which it acquired the jurisdiction over the parties, the consent of the parties to the trial upon the merits being a waiver of the irregularity of procedure.

MUNICIPAL TAXATION — POWER OF CITY COUNCIL — CHARTER OF SANTA BARBARA — OPERATION OF POLITICAL CODE. — The act of the legislature of March 10, 1874, under which the city of Santa Barbara was incorporated, providing for the levy of an annual tax, not exceeding one per cent, for the payment of bonds and interest and the current expenses of the city, one third to be devoted to the payment of the interest upon and establish a sinking fund for the payment of the bonds, did not repeal section 4871 of the Political Code, providing that the direct taxes imposed by a common council in any one year must not exceed two per cent of the valuation of property within the city, but merely suspended its operation as to the city of San Barbara; and the act of March 15, 1876, amending the act of March 10, 1874, so as to provide that for the payment of the bonds and interest thereon an annual tax should be levied, not exceeding one fourth of one per cent, repealed the portions of the act of March 10, 1874, referring to the levy of taxes for current expenses of the city, and leaves section 4871 of the Political Code as the only limitation on the power of common council in fixing the rate of the levy of the tax to pay the current expenses of the city; and a levy by the council, at the rate of \$1.50, upon each one hundred dollars of taxable property, is not in excess of its power.

ID. — STATUTORY CONSTRUCTION — SPECIAL STATUTE — EXCEPTION FROM GENERAL LAW — EFFECT OF REPEAL. — A special provision of the legislature, applicable to a certain city only, excepts the city from the effect of a general law upon the same subject, to the same extent as though it were a part of the general law, and when the provision creating the exception is repealed, the operation of the general law is extended to that extent.

NEW TRIAL — STATEMENT — AMENDMENT — APPEAL — POWER OF SUPREME COURT. — The supreme court has no power to correct a statement upon motion for a new trial upon affidavits showing an error therein.

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

B. F. Thomas, for Appellant.

Thomas McNulta, for Respondent.

GAROUTTE, J. —Action brought in the police court to recover city taxes assessed against the property of appellant. A demurrer to the complaint was overruled, whereupon appellant answered, setting forth, among other matters, that the common council had no power to levy the tax, that the same was illegal and void, and asking that the action be transferred to the superior court for trial, under the provisions of section 838 of the Code of Civil Procedure. The application for a transfer was denied, and the court proceeded to hear the cause upon its merits, whereupon judgment was rendered for plaintiff for the sum demanded and costs. Appellant took an appeal to the superior court from the judgment on questions of both law and fact, and judgment was again rendered in favor of respondent. A motion for a new trial, based upon a statement of the case, was denied, and this appeal is prosecuted from the judgment and order denying a new trial.

If the answer of appellant, filed in the police court, did not raise an issue as to the legality of the tax sought to be recovered, it follows that the judgment of the superior court was final, and this appeal should be dismissed, but upon an examination of the pleadings, it is apparent that such an issue is presented. In the case of *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 143, it was incidentally said that there was no provision of law authorizing a transfer of a cause from a police court to a district court, but we cannot subscribe to such doctrine. Section 933 of the Code of Civil Procedure provides: "All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts." In the case of *City of Santa Barbara v. Stearns*, 51 Cal. 499, the transfer of a cause from the police court to the district court was expressly approved as being authorized under the foregoing section of the code, and there can be no doubt but that the section is sufficiently broad to furnish authority for such a course.

The verified answer of appellant having disclosed facts

which required a transfer of the cause to the superior court, from the time of the filing of such answer the police court was ousted of its jurisdiction to proceed further upon the merits presented by the pleadings. (*People v. Mier*, 24 Cal. 61; *City of Santa Barbara v. Stearns*, 51 Cal. 499.) Such being the fact, the judgment of the police court was void, and if it possessed sufficient value to entitle it to the dignity of an attack, could have been successfully assailed by defendant in various ways. But entirely disregarding the action of the lower court upon the jurisdictional question, appellant carried the case to the superior court by appeal upon questions of both law and fact, and proceeded to trial upon the merits. The proper procedure certainly would have been for the superior court to have set aside the judgment, and ordered the police court to remand the cause, in accordance with section 838, heretofore cited. Under such a course, the superior court would have obtained jurisdiction of the cause in the regular and orderly way, and upon the right to appeal to this court, there could be no question. The police court had no jurisdiction to try the cause upon the merits, and it necessarily follows that the superior court had no appellate jurisdiction to try the case at all. But the superior court had original jurisdiction of the subject-matter, and the fact that the case gained ingress to it by way other than the front door in no manner affects its jurisdiction to hear and determine the cause. Having jurisdiction over the subject-matter, the court obtained jurisdiction over the parties, when, without objection, they proceeded to trial upon the main issue, and then its jurisdiction became complete.

The course adopted was a serious irregularity in procedure, but not jurisdictional, and becomes entirely immaterial when we consider the case, as we shall consider it, from the standpoint of being an original action brought in the superior court. If the appellate jurisdiction from the police court, and the original jurisdiction upon matters involving the legality of a tax, etc., were not both vested in the superior court, then the

course pursued in *Santa Barbara v. Stearns*, 51 Cal. 499, would have to be followed, and the cause sent back with instructions to remand to the proper court. But the situation here presented is entirely different, and the case is clearly before us upon its merits.

In *Randolph County v. Ralls*, 18 Ill. 29, a case entirely similar in principle, the court said: "The circuit court, then, had original jurisdiction of the subject-matter, and the parties, by voluntarily appearing and consenting to a trial between them upon that subject-matter, waived all objection to jurisdiction of the parties. The suit stood, so far as the jurisdiction of the court is concerned, the same as if it had been originally commenced in the circuit court in the ordinary way, and the parties brought in by the service of process; or if they had voluntarily entered their appearance without any previous proceedings, and without objection gone to trial. In the case of *Allen v. Belcher*, 3 Gilm. 594, the suit was commenced before a probate justice of the peace, and appealed to the circuit court, where the parties appeared, and the cause was by consent tried; and, upon error, this court held that it was immaterial whether the probate justice had jurisdiction of the subject-matter of the suit, and the parties having consented to its jurisdiction of their persons, the circuit court might adjudicate upon the subject-matter as an original cause. . . . It would be trifling with courts, and the rights of parties, to permit suitors, after voluntarily appearing and going to trial, to avail themselves of objection to the preliminary proceedings by which the cause of the parties were in court. These are dilatory matters which they may waive, and they are deemed to have waived them by full appearance without objection."

It is contended that the levy of taxes, at the rate of \$1.50 upon each one hundred dollars of taxable property, was in excess of the power of the common council. The city of Santa Barbara was incorporated under an act of the legislature, approved March 10,

1874; the following sections of which act read as follows:—

“Sec. 1. The territory described in the second section of the act, and the inhabitants thereof, are hereby declared to be a municipal corporation under the Political Code of this state.”

“Sec. 10. To provide for the payment of the said bonds and the interest thereon, and the current expenses of the said city, an annual tax shall be assessed, and levied, and collected, not exceeding one per cent; and one third of the money resulting from the said tax shall be devoted to the payment of the annual interest of the said bonds, and constitute a sinking fund for their redemption.”

An amendatory act to the foregoing charter was approved March 15, 1876; of which act section 3 is as follows:—

“Sec. 3. Section 10 of said act is hereby amended so as to read as follows: Section 10. To provide for the payment of said bonds, and the interest thereon, an annual tax shall be assessed and collected, not exceeding one fourth of one per cent, and the money resulting from the said tax shall be devoted to the payment of the interest of the said bonds and constitute a sinking fund for their redemption.”

Under the general law of the state pertaining to municipal corporations, which took effect January 1, 1873, we find section 4371 of the Political Code, which reads: “The direct taxes imposed by a common council in any one year must not exceed two per centum of the valuation of property within the city.” Also section 4408, referring to the powers of the common council, subdivision 9, “to levy and collect taxes.”

With this legislation before us, it is apparent what the power of the common council was as to the levy of taxes at the time the levy here involved was ordered. The general power to levy and collect taxes is expressly granted to respondent by said section 4408; and in the absence of section 10 of the act of 1874, the limitation of

the power of the common council in fixing the rate of the levy would be found in section 4371 of the Political Code, already quoted. But section 10 of this act declares a different limitation, and must control and supersede the general law as far as respondent's interests are involved. Section 3 of the act of 1876 makes a most material amendment to section 10, and as section 10 stands amended, it results in the repeal of all those portions of the original section referring to the levy of a tax for current expenses of the city government, and leaves the limitation upon the power of the council, with reference only to the tax to be levied and collected to pay interest upon and establish a sinking fund for the payment of certain bonds. If appellant's contention were true, that section 10 of the act of 1874 repealed section 4371 of the Political Code, then the repeal of the material portions of section 10 by the act of 1876 left the power of the council to levy a direct tax entirely without statutory control or limitation of any kind, and the validity of the levy here involved would necessarily withstand attack. But section 10 did not repeal the general law upon the subject. It is plain that a special act of the legislature, pertaining to one city, cannot repeal a general law pertaining to all cities. Neither can it properly be said to be in full effect as to other cities and repealed as to respondent. The effect of the enactment of section 10 was simply to suspend the operation of the general provision of law as to respondent, and when section 10 was repealed, the suspension no longer existed, and respondent came under the operation of the general law. Again, it may be said, the special provision excepted respondent from the effect of the general law, to the same extent as though it were a part of the general law, and when the provision creating the exception was repealed, the operation of the general law was extended to that extent. (See *Smith v. Hoyt*, 14 Wis. 252; *Heinssen v. State of Colorado*, 14 Col. 228.) We conclude that section 4371 of the Political Code is in full force and effect as to respondent.

Appellant makes many objections to the rulings of the court upon the admissibility of evidence, but owing to the fact that the cause must be returned to the lower court for a new trial, and those matters may not again arise, we refrain from reviewing the assignments based upon such rulings.

The complaint alleges that the rate of the levy made by the council was \$1.50 upon each one hundred dollars of taxable property, and by calculation it is demonstrated that the amount of the tax for which suit is brought was computed at such rate. The ordinance of respondent, found in the record, shows that the levy for taxes was made upon the basis of \$1.40 per each one hundred dollars of taxable property. A fatal variance is thus created between the pleading and the proof. Respondent, since the argument of the cause in this court, has presented affidavits asking us to correct the statement upon motion for a new trial, by amending the copy of the ordinance set out therein, so that it shall conform to the allegations of the complaint. We have no power to adopt such a course, as has been fully decided in *Hyde v. Boyle*, 86 Cal. 352, and *In re Gates*, 90 Cal. 257.

Let the judgment and order be reversed, and the cause remanded for a new trial.

PATERSON, J., and HARRISON, J., concur.

209. CAL.—35

[No. 14642. Department Two. — July 23, 1892.]

JOHN E. HIGH, APPELLANT, v. THE BANK OF COMMERCE, ETC., RESPONDENT.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION — ORDER AUTHORIZING JUDGMENT CREDITOR TO SUE — CONSTITUTIONAL LAW. — Section 720 of the Code of Civil Procedure, providing that the judge may, by order, authorize a judgment creditor to institute and maintain an action against an alleged debtor of the judgment debtor, is not unconstitutional, on the alleged ground that the judgment debtor has under it no notice of the supplementary proceeding after judgment affecting his rights of property, or that his debtor may be compelled to pay the debt twice.

1D. — ACTION AGAINST GARNISHEE — PLEADING — JUDGMENT — ORDER AUTHORIZING SUIT. — Allegations in a complaint against a garnishee, in an action by a judgment creditor, authorized in proceedings supplementary to execution against the judgment debtor, that the assignor of the plaintiff "recovered a judgment" in the superior court, "which judgment was duly entered," etc., and that the order authorizing the suit was "duly made," are sufficient as against a general demurrer.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

D. L. Withington, for Appellant.

Luce & McDonald, for Respondent.

FOOTE, C.—The plaintiff became the assignee of a judgment obtained by one Keturah White against N. A. Comstock and Carl Trotsche and W. E. High. He brought this action against the defendant here, as garnishee of Comstock and Trotsche, in proceedings supplemental to execution, under the provisions of the Code of Civil Procedure contained in sections 716 to 720, inclusive.

A demurrer to the complaint was filed by the defendant, to the effect that the pleading in question did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff declining to amend the complaint, judgment was rendered for the defendant, from which the plaintiff prosecutes this appeal.

The first contention of the respondent which we will notice is that in which he asserts that section 720 of the Code of Civil Procedure is unconstitutional. He bases this view of the matter upon a decision of the appellate court in *Bryant v. Bank of California*, 8 Pac. Rep. 644, where it is said by Mr. Justice Myrick: "Inasmuch as no notice to the judgment debtor of the proceeding authorized by section 720 of the Code of Civil Procedure is provided for, we are of opinion that that section which purports to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor, is unconstitutional and void. This not only for the protection of the rights of the judgment debtor, but also for the protection of those of his alleged debtor, who might otherwise be compelled to pay twice."

It has been held in *Hexter v. Clifford*, 5 Col. 168, in reference to a statute similar to that of California, that no such notice is required; and this seems to be the view entertained in New York with reference to the qualification that notice may be given in the discretion of the judge. (4 Wait's Practice, 131.)

Jurisdiction having been once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied. Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action. (4 Wait's Practice, b, p. 128.)

So far as the judgment debtor is concerned, he cannot complain; he is a party to the judgment, and is fully aware of the legal effect of it, viz., that what his debtors owe him can be applied, by proper proceedings in the action which is still pending, to the satisfaction of his judgment debts; and due process of law has been had to make him aware of that fact. If, then, anything is due from his debtor, he is not injured if it is so applied. If nothing is due him from such debtor, then the matter is of no concern to him.

The debtor of the judgment debtor is not to be permitted to say that he cannot protect himself against paying the debt twice, first to the creditor of the judgment debtor in this proceeding, and then to the judgment debtor who has no notice of the proceeding; the reason for this being that the debtor of the judgment debtor is not without a remedy to prevent this result in the proceeding itself, in that all he is required to do to accomplish that result is, that he suggest that his creditor, the judgment debtor, be made a party to the proceeding; and since he can protect himself, it is idle to say he may be compelled to pay his debt twice.

The statute in question must be held to contemplate this, and not that any such thing could be accomplished as that the debtor of a judgment debtor might, under its provisions, be made to pay a debt twice. We therefore see no force in the suggestion that the statute is unconstitutional, in that the judgment debtor has under it no notice of the supplementary proceeding after judgment affecting his rights of property. And the contention is equally without force that such has been the decision binding on the appellate court in *Bryant v. Bank of California*, 8 Pac. Rep. 644.

In *Collins v. Angell*, 72 Cal. 513, Mr. Justice McFarland, speaking for the court, virtually declares that no constitutional question was decided in the case first mentioned. And it appears from 7 Pac. Rep. 131, where the case on which the respondent relies was first determined in Department, and in 8 Pac. Rep. 644, where the same case was heard in Bank, that at the most only three of the judges took the view contended for by respondent.

But the respondent contends further that the complaint does not show that the judgment made the basis for this proceeding is valid. And that it is not shown by that pleading that a valid order was made authorizing the proceeding to be commenced.

The allegation in question relative to the judgment is: "That upon the second day of March, 1891, Keturah

White *recovered* a judgment in this superior court which judgment was duly entered," etc.

The respondent says that this is not a sufficient statement to show that the judgment "was duly given."

In *McCutcheon v. Weston*, 65 Cal. 39, it was held that an averment that a judgment was "recovered, entered, and docketed" was sufficient.

As this docketing is only to fix a lien of the judgment already entered in the judgment-book on the real property of the debtor (Code Civ. Proc., sec. 671), we do not think it essential to aver such docketing to show that the judgment was "duly given," if it is already averred that it was "recovered" and "entered."

As to the insufficiency of the averments with reference to the order authorizing suit, it seems that as against a general demurrer the allegation that it was "duly made" is sufficient, even if the specific facts set out are defective, which we do not decide. (*Dore v. Thornburgh*, 90 Cal. 66; *Bull v. Houghton*, 65 Cal. 422.)

We therefore conclude that the demurrer was improperly sustained, and that the judgment appealed from should be reversed, and so advise.

VANOLIEF, C. and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

McFARLAND, J., DE HAVEN, J., SHARPSTEIN, J.

[No. 14708. Department Two. — July 23, 1892.]

JOHN REBMAN, RESPONDENT, v THE SAN GABRIEL VALLEY LAND AND WATER COMPANY, APPELLANT.

UNRECORDED BUILDING CONTRACT — ACTION FOR REASONABLE VALUE OF WORK AND MATERIALS. — An action may be maintained for the reasonable value of work done and materials furnished in the erection of a building, although the value of the labor and materials exceeds one thousand dollars; and it is no defense to such an action, either that the implied contract for reasonable value was not recorded, or that the work and materials were done and furnished in pursuance of a written contract which was not filed for record in accordance with the statute.

ID. — RECORD OF IMPLIED CONTRACT — CONSTRUCTION OF CODE. — The code does not provide for recording an implied contract which is not complete until the labor is done and materials furnished, and could not be recorded before the commencement of the work. The statute only applies to express contracts stating obligations thereafter to be performed.

ID. — INVALIDITY OF UNRECORDED WRITTEN CONTRACT — EVIDENCE OF REASONABLE VALUE. — A written contract for the erection of a building for a price exceeding one thousand dollars, if not recorded, is wholly void for all purposes, and is not competent evidence of the value of the labor done and materials furnished in the erection of the building, in an action to recover their reasonable value.

ID. — FINDINGS — WORK AND LABOR UNDER INVALID CONTRACT. — In an action for the reasonable value of labor done and materials furnished in the erection of a building, where the defendant alleges that the work done and materials furnished were in pursuance of a written contract, a finding by the court that the alleged contract never had been recorded, and was therefore wholly void, is equivalent to a finding that there was no written contract, and that no labor was done or materials furnished under it; and it is immaterial whether the work and materials were or were not in accordance with the terms of the unrecorded written contract.

ID. — COUNTERCLAIM FOR DAMAGES FOR BREACH OF INVALID CONTRACT — FINDINGS. — In such action, where the answer pleaded damages as a counterclaim, because of the failure of the plaintiff to complete the building on the date stipulated in the written contract, and a cross-complaint filed by the defendant also claimed damages for such delinquency, a finding by the court that the written contract relied upon by the defendant, upon the breach of which such damages depended, was void for want of filing in the recorder's office, disposes of the issues thus raised.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

A. H. Judson, and M. C. Hester, for Appellant.

J. T. Houx, and John Haynes, for Respondent.

VANOLIEF, C.—This is an appeal by defendant from a judgment of \$8,263.24 against it for a balance found to be due the plaintiff for work and labor and materials furnished in building a hotel, a laundry, a gas-house, and for repairing the hotel. The appeal is upon the judgment roll containing a bill of exceptions, raising questions of law and fact.

A distinct written contract was signed and delivered by the parties for the construction of each of the buildings above mentioned, and for the repairing of the hotel, before the work was commenced. The contract price for furnishing materials and building the hotel was \$48,900; for the laundry it was \$1,100; for the gas-house it was \$484; and for repairing the hotel it was \$595. None of these contracts was ever filed or recorded in the office of the county recorder of the county in which the buildings are situated. They were made at different times, the contract for the hotel being first in order of time.

The complaint consists of five counts: 1. To recover the reasonable value of the labor and material in building the hotel, alleged to be \$53,602.76, less \$47,000 paid thereon; 2. To recover the reasonable value of labor and materials in building the laundry, alleged to be \$1,100, less \$863.50 paid; 3. A special count upon the written contract for building the hotel, to recover a balance of \$1,900 alleged to be unpaid; 4. A special count upon the gas-house contract, to recover a balance of \$104.06, alleged to be due and unpaid; and 5. A special count upon the written contract for repairing the hotel, to recover an alleged balance of \$127.95. The prayer of the complaint is, that plaintiff recover the sum of these several balances, with interest. The complaint is not verified.

The answer of defendant,—1. Denies each and every

allegation in the complaint; 2. Alleges payment in full; 3. Alleges, in answer to the first count, that all the labor done and materials furnished for the hotel were done and furnished under and in pursuance of the written contract, and that defendant has fully performed its part of said contract; 4. Alleges, in answer to the second count, that the labor and materials done and furnished for the laundry were done and furnished under a written contract, which defendant had fully performed on its part; 5. In further answer to the third count, alleges that by the contract therein mentioned, the plaintiff was required to complete the hotel by the eighth day of December, 1887, but failed to complete it until April, 1888, by reason whereof defendant sustained damages in the sum of six thousand dollars, which is pleaded as a counterclaim; 6. In answer to the fourth and fifth counts, alleges full performance of the contracts therein mentioned on its part; and 7. Alleges, in answer to the entire complaint, a settlement of all matters mentioned therein, and payment in full of the balance agreed upon in the settlement, which payment was accepted by plaintiff in full satisfaction of all claims against defendant on account of all matters mentioned in the complaint.

The defendant also filed an unverified cross-complaint, claiming damages for non-performance of the written contract for the building of the hotel within the time limited by, or in accordance with, the specifications of that contract, which cross-complaint was answered by a general denial thereof.

The court found for the plaintiff upon all the issues, except those arising upon the third count of the complaint, as to which it found that the hotel contract, upon which that count was based, had not been filed in the recorder's office, and was therefore void.

1. Counsel for appellant contend that the first count of the complaint does not state facts sufficient to constitute a cause of action, because it does not show that the implied contract, upon which it rests, was filed in the re-

recorder's office in accordance with section 1183 of the Code of Civil Procedure, although it appears that the amount agreed to be paid thereunder exceeds one thousand dollars.

But the first count does not show that any particular amount was *agreed* to be paid for the labor and materials expended in building the hotel; but only that such labor and materials "were reasonably worth \$53,602.76." Nor does the code provide for recording an implied contract, even conceding that it would be possible and practicable to record such a contract.

But the real question intended to be presented under this head is expressed by counsel for appellant as follows: "Can parties who have failed to put their contract in writing avoid the force and penalty of the statute by suing on a *quantum meruit* or *quantum valebat*?"

Of course, no party can evade the force or penalty of the statute. Counsel's question, however, assumes that the statute applies to implied contracts, and that the penalty is incurred by a failure to record an implied contract, and thus evades the only question in dispute, viz.: What are the force and the penalty of the statute?

The statute literally applies only to express contracts stating the mutual obligations of the parties thereto, *thereafter* to be performed; and requires such contracts to be reduced to writing, and filed in the recorder's office "before the work is commenced." Yet no implied contract for labor or materials is complete until after the labor is done or the materials furnished at the request of the owner of the contemplated structure. Neither the mere request of such owner for the performance of labor, or the furnishing of materials, nor the mere performance of labor, or the furnishing of materials without such request, express or implied, constitutes a complete contract by implication. An implied contract arises only from the request of one party and performance by the other, though the request is often inferred from the circumstances attending the performance. It follows that the legislature could not have intended to require implied

contracts for labor and materials to be written and recorded before the commencement of the work.

Nor does the statute expressly, or by necessary implication, prohibit an action upon such implied contracts, to recover the value of the labor or materials, though such value may exceed one thousand dollars. (See *Kiessig v. Allspaugh*, 91 Cal. 234.) On the contrary, section 1197 of the chapter on liens seems to except such contracts from the penalty of a failure to record.

"Sec. 1197. Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor."

In *Holland v. Wilson*, 76 Cal. 434, the complaint was similar to the first count of the complaint in this action; and the answer thereto alleged as a defense "that the work and materials were done and furnished in pursuance of a written agreement, executed, by the defendant and the plaintiff . . . before the work was commenced." The plaintiff demurred to this answer, on the ground that the written contract was void because it did not appear to have been recorded, as required by section 1183 of the Code of Civil Procedure. The lower court sustained the demurrer, and gave judgment for plaintiff on the implied contract, and this court affirmed the judgment, on the ground that the written contract was void because not recorded. Yet on the theory of counsel for appellant in this action, the answer to which the demurrer was sustained was a perfect defense to that action, though the written contract pleaded had not been recorded. If the theory of the appellant here is correct, the demurrer to the answer in the case cited should have been overruled, and the plaintiff therein should not have been permitted, as he was, to "avoid the force and penalty of the statute, by suing upon a *quantum valebat* count." (See *dictum* in *Palmer v. White*, 70 Cal. 220.)

2. The second count is like the first, and is objected

to upon the same grounds, and therefore needs no additional consideration.

3. It is claimed for appellant that the third count, which is a special count upon the written contract, does not state a cause of action, because that contract was not recorded. But the trial court sustained this point, and plaintiff recovered nothing upon that count, and claims nothing upon it here.

4. Counsel for appellant contend, that, conceding the hotel contract to be void because not recorded, nevertheless it should have been received as conclusive evidence of the value of the labor done and materials furnished by plaintiff in the building of the hotel; and therefore that the evidence did not justify the court in finding, as it did, that the reasonable value of such labor and materials was greater than the price stated in that contract.

This means that the written contract, though not recorded, is not entirely void, but obligatory upon the parties in at least one important respect.

I think this point cannot be maintained. The question involved relates merely to the construction of section 1183 of the Code of Civil Procedure, and has been expressly and specifically decided by this court adversely to the contention of appellant. (*Kellogg v. Howes*, 81 Cal. 170; *Schallert-Ganahl L. Co. v. Neal*, 90 Cal. 214; *Willamette S. M. Co. v. Los Angeles College Co.*, 94 Cal. 229; *Holland v. Wilson*, 76 Cal. 434.)

In *Willamette S. M. Co. v. Los Angeles College Co.*, 94 Cal. 229, it is said that the effect of failing to record a building contract "was to render the contract 'wholly void' for all purposes. It cannot be the basis of a recovery by the contractor against the owner, nor can it be looked to for the purpose of determining the amount for which the owner is liable, or when any payment is to be made. . . . If the contract is 'wholly void,' there is neither a 'contract' nor an 'original contractor.' . . . Inasmuch as by a failure to file the contract in the recorder's office it became wholly void, it was not

available as a defense for any purpose, either to determine the amount of the contract price, or to limit the liability of the appellant, or as a foundation of a right to complete the building according to its terms." And all this seems to be fairly deducible from the other cases above cited.

But even conceding that the void contract is merely competent evidence, tending to prove the value of the labor and materials, but not conclusive, its effect was only to create a conflict with other evidence tending to support the finding in question, and quite sufficient to justify it, by the rule here applicable.

5. The point that there is no finding upon the issue as to whether the labor was done and the materials furnished under and in pursuance of the alleged written contract is not well taken. The finding that the alleged contract—the only contract relied upon by defendant—never had been recorded, and was therefore wholly void, is equivalent to a finding that there was no written contract; from which it necessarily follows that no labor or materials could have been done or furnished under such contract, and that no defense to this action can be based upon it. This conclusion is not affected by the facts that a writing, corresponding in form to the alleged contract, had been signed and delivered by the parties, and that the labor may have been done and materials furnished in accordance with the terms of that paper. But in this connection, it is to be observed that if defendant's cross-complaint is true, the labor was not done according to that contract.

6. The evidence is sufficient to justify the seventh finding, to the effect that the parties had no settlement of any of the matters mentioned in the complaint, and that plaintiff did not receive any sum or sums of money paid him, in full satisfaction of any of his demands.

7. The issues arising upon defendant's counterclaim and cross-complaint are completely disposed of by the finding that the alleged written contract, upon breaches of which they solely depend, was void because not filed

in the recorder's office. (*Holland v. Wilson*, 76 Cal. 434.) Besides, the court did find that the delay in completing the work, complained of in the cross-complaint, was not attributable to any default of the plaintiff.

Other points are made by appellant, but those of them to which an answer may not be found under the foregoing heads require no special consideration.

I think the judgment should be affirmed.

BELCHER, C., and FOOTE, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

[No. 14352. Department Two. — July 23, 1892.]

IN THE MATTER OF THE ESTATE OF PHILANDA J.
LAMB, DECEASED.

HOMESTEAD — SEPARATE PROPERTY OF HUSBAND — ENTRY OF HOMESTEAD CLAIM — PATENT — RELATION TO EQUITABLE INTEREST. — A husband who, before his marriage, makes proper application to enter land as a homestead under the laws of the United States acquires an equitable interest in the land which is his separate property, although he has not, at the time of his marriage, fully completed the term for which he was to reside upon and cultivate it, so as to entitle him to receive a patent therefor from the United States, and the legal title afterwards acquired by the patent relates back to the equitable interest, and is also his separate property; and a homestead filed thereon by the wife alone is not a selection from community property, under section 1474 of the Code of Civil Procedure.

ID. — ABANDONMENT OF HOMESTEAD — UNRECORDED AGREEMENT FOR DIVISION. — A homestead selected by a wife upon the separate property of the husband is not abandoned by a subsequent agreement of the spouses for its division between them, which is not recorded by either of the parties.

ID. — DEEDS BETWEEN HUSBAND AND WIFE SUBJECT TO HOMESTEAD. — Where a wife has filed a homestead upon separate property of the husband, a

deed of the land, subsequently executed by the husband to the wife, operates to vest the legal title thereto in the wife as her separate property, but does not constitute an abandonment of the homestead; and a deed of part of the land by the wife to the husband, in pursuance of an agreement for their separation, and a division of the property, simply reinvests him with the title to the land so conveyed, and a deed to her by the husband of the remainder of such land operates merely as a confirmation or further assurance of title to the land which it purports to convey, all of the land still being subject to the homestead.

ID. — WIFE'S SELECTION OF HOMESTEAD UPON SEPARATE PROPERTY OF HUSBAND — EFFECT OF DEED FROM HUSBAND — TITLE OF HEIRS. — Where a wife has filed a declaration of homestead upon the separate property of her husband, the subsequent acquisition by her of part of such property as her separate property does not have the effect to change the prior declaration into a selection by her of a homestead from her separate property; and upon the death of the wife, the property so conveyed to her is to be treated as if the homestead thereon had been selected without her consent, and as vesting in her heirs, subject to the power of the superior court to assign it for a limited period to the family of the deceased.

ID. — PROBATE HOMESTEAD — OBJECT OF CODE PROVISION. — The object of section 1474 of the Code of Civil Procedure, concerning probate homesteads, is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use.

ID. — "FAMILY" — CONSTRUCTION OF CODE. — Although the word "family," in its ordinary signification, refers to two or more persons, and as used in section 1474 of the Code of Civil Procedure, concerning probate homesteads, will include those living under the same roof as kindred or dependents, and under one head, thus constituting a family, as that term is generally used, yet the word, as used in that section, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member, and a surviving husband of a deceased wife, who had no other family, and who selected a homestead, constitutes the "family of the decedent" within the meaning of that section.

ID. — RIGHT TO PROBATE HOMESTEAD — DISCRETION. — The right of a surviving husband to an order assigning to him, as "the family of the decedent," a probate homestead for a limited period, under the provisions of section 1474 of the Code of Civil Procedure, is not an absolute right, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it.

APPEAL — BILL OF EXCEPTIONS — AMENDMENT. — Where an appeal is taken from a decision made before the settlement of a bill of exceptions, the allowing of an amendment to the bill, by the insertion of specifications of the particulars in which it is claimed that the findings and decree of the court are not sustained by the evidence, is proper, as the effect of the amendment is simply to enable the appellate court to review the decision of the trial court, in view of all the facts which the trial court had before it when it made such decision.

APPEAL from a decree of the Superior Court of San Diego County setting apart a homestead.

The facts are stated in the opinion of the court.

E. W. Hendrick, Chapman & Hendrick, and O. A. Munn,
for Appellant.

The homestead was upon the separate property of the deceased; for although the property was community property when the declaration was filed, the deed made by Lamb to his wife in February, 1888, transformed the same into the separate property of the latter. (*Burkett v. Burkett*, 78 Cal. 311, 313; 12 Am. St. Rep. 58; Platt on Rights of Married Women, sec. 70; Thompson on Homesteads, sec. 473; *Baines v. Baker*, 60 Tex. 140; *Spoon v. Van Fasson*, 53 Iowa, 494; *Riehl v. Bingenheimer*, 28 Wis. 84.) The signature of the wife is not necessary. The deed from husband to wife did not disturb the homestead quality of the land, but conveyed the title to her, subject to the homestead. (See *Burkett v. Burkett*, 78 Cal. 313; 12 Am. St. Rep. 58.) The *prima facie* presumption from a deed from husband to wife is, "that it was intended to change the character of the property from community to the separate property of the wife." (*Taylor v. Opperman*, 79 Cal. 470; *Burkett v. Burkett*, 78 Cal. 310; 12 Am. St. Rep. 58; *Swain v. Duane*, 48 Cal. 358; *Story v. Marshall*, 24 Tex. 305; 76 Am. Dec. 106; Platt on Rights of Married Women, sec. 34.) If a homestead be selected from the separate estate of either husband or wife, it vests, on the death of the person from whose property it was selected, in his or her heirs. (Civ. Code, sec. 1265; *Beck v. Soward*, 76 Cal. 531; *Mawson v. Mawson*, 50 Cal. 543; *Hutchinson v. McNally*, 85 Cal. 619.) A spouse who has voluntarily agreed to live separate and apart from the other, and has agreed, for a valuable consideration, to waive all other claims against the other, ceases to be a member of the immediate family of the deceased, and is not entitled to a family allowance. (*In re Noah*, 78 Cal. 583; 2 Am. St. Rep. 829; *In re Noah*, 88

Cal. 468; *Young v. Hicks*, 92 N. Y. 235; *Murray v. Carrigill*, 32 Me. 517; *Estate of Byrne*, Myrick's Prob. Rep. 1.) The provision for a homestead is based upon the same principle as the provision for a family allowance, and hence will follow the above rule. (See, especially, cases discussed in *In re Noah*, 73 Cal. 583; 2 Am. St. Rep. 829.) But the homestead had been wholly abandoned. The parties had joined in executing articles of separation, which were signed by both parties in the presence of witnesses. Proof of the execution was made in the manner provided by law for the execution of deeds before witnesses. (Civ. Code, secs. 1195-1197.) A homestead can be abandoned by a declaration of abandonment, or a grant thereof executed and acknowledged by husband and wife. (Civ. Code, sec. 1243.)

Lawrence Middlecoff, and *Eugene Daney*, for Respondent.

Whether the property in controversy was community property or not is immaterial, as in either event it vested absolutely in the surviving husband upon the death of the wife. (Code Civ. Proc., sec. 1474.) If section 1265 of the Civil Code governed, the question as to whether the property was separate or community might be relevant; but there is an apparent conflict between section 1474 of the Code of Civil Procedure and section 1265 of the Civil Code, and as section 1265 went into effect ten days earlier than section 1474, the latter must prevail. (Endlich on the Interpretation of Statutes, secs. 182, 183, 222; *In the Matter of Yick Wo*, 68 Cal. 304; 58 Am. Rep. 12, and cases cited.) The homestead on the property has never been abandoned, for the reason that it can only be abandoned in the manner provided by the statute, which, as far as applicable to this case, would be by a declaration of abandonment, or a grant of the property executed and acknowledged by George W. Lamb and Philanda J. Lamb, jointly. (Civ. Code, secs. 1242, 1243; *Barber v. Babel*, 36 Cal. 14; *Flege v. Garvey*, 47 Cal. 375; *Gagliardo v. Dumont*, 54 Cal. 499; *Porter v. Chapman*, 65

Cal. 365; *Tipton v. Martin*, 71 Cal. 325; *Burkett v. Burkett*, 78 Cal. 313; 12 Am. St. Rep. 58; *Gleason v. Spray*, 81 Cal. 220; 15 Am. St. Rep. 47.) The articles of separation were not intended to be an abandonment of the homestead, as the parties never intended that it should ever be recorded. A declaration of abandonment is only effectual from the time it is filed in the office where the homestead is to be recorded. (Civ. Code, sec. 1244.) If there were no other valid objection to the alleged deeds or articles of separation operating as an abandonment of the homestead, it would be sufficient to say that a conveyance from a husband to his wife of the property upon which there is a homestead does not operate as an abandonment thereof, but only vests in the wife the legal title to the property, and leaves the homestead intact. (*Burkett v. Burkett*, 78 Cal. 314; 12 Am. St. Rep. 58.) The death of one of the spouses does not affect the homestead in question, as the homestead is intended for the head of the family. The husband, at the death of his wife, remained the head of the family (*Tyrrell v. Baldwin*, 78 Cal. 475, 476; *Sanders v. Russell*, 86 Cal. 120, and cases cited.) An order of the court is unnecessary to vest the property in the surviving spouse in a case of this kind, as the statute itself vests the same in the survivor by descent. (*Herrold v. Reen*, 58 Cal. 445-447, and cases cited; *Baker v. Brickell*, 87 Cal. 339; Code Civ. Proc., sec. 1474.)

DE HAVEN, J. — This is an appeal from an order setting apart to George W. Lamb, the surviving husband of deceased, upon his petition therefor, a homestead upon 160 acres of land described therein. The appeal is taken by the father of deceased. The facts, as disclosed by the record, are these: The petitioner and deceased were married September 15, 1884. Prior to this time the petitioner had filed in the proper United States land-office his application to enter the land in controversy as a homestead, under the laws of the United States, and had resided thereon for four years, and one year after such

marriage he made his final proof, entitling him to a patent therefor, which was issued to him on July 9, 1889. On November 17, 1887, the deceased filed in the office of the proper recorder a declaration of homestead upon the whole of said land under the laws of this state, and on February 23, 1888, the petitioner made to her a deed of this and other land. Thereafter differences arose between them, and in November, 1889, the deceased commenced an action against petitioner for a divorce and for a division of the property, and upon the twenty-second day of that month they made an agreement in writing, for the purpose, as stated therein, of "terminating all further controversies between them." The agreement, among other things, provided that they should live separate and apart from each other, and contained also this provision: "The said George W. Lamb, in consideration of the adjustments herein referred to, and other releases of the said Philanda, his wife, does hereby convey and release all claim to the following described property, to wit"; followed by a description of fifty acres of the land in controversy; and the said deceased agreed to release all other property to said Lamb "now owned by him." In pursuance of this agreement, the petitioner gave the deceased a deed of the 50 acres described in the agreement, and she gave to him a deed of the remaining 110 acres. The agreement referred to was not recorded in the lifetime of deceased, nor was either of the deeds which were given in pursuance thereof. In this connection, the petitioner testified that after the execution of this agreement, and until her death, he and his wife continued to live together upon the land in controversy, and in a house situate upon the fifty acres which he deeded to her.

The petitioner further testified, in reference to the agreement for a separation and division of the property, that it was subsequently understood between them that it was to be of no effect; "we did not count that instrument worth anything; we never calculated to have it recorded."

The superior court, in its decree, set apart to the petitioner as his property, and free from further administration, all of the land described in the declaration of homestead filed by the deceased.

1. The claim of respondent is, that the decree of the court is justified by section 1474 of the Code of Civil Procedure. That section, so far as material to the question under consideration, is as follows: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests on the death of the husband or wife absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent."

It will be observed that in order to bring a homestead within the provisions of this section, so that upon the death of one of the spouses it "vests absolutely in the survivor," it must be made to appear that it was selected from the community property in the first instance, "or from the separate property of the person selecting or joining in the selection of the same," and we are of opinion that upon the facts as above stated the homestead in this case did not vest absolutely in the petitioner upon the death of his wife.

The land in controversy was not community property at the date when the deceased made and recorded her declaration claiming the same as a homestead, but it was the separate property of the petitioner. The petitioner had, before his marriage, made application to enter the land as a homestead under the laws of the United States; and although he had not, at the time of such marriage, fully completed the term for which he was to reside upon and cultivate it, so as to entitle him to receive

a patent therefor from the United States, still he had fully performed all of the conditions required of him by such laws up to that date, and by his prior acts of entry, residence, and cultivation, he had acquired an equitable interest in the land, which, of course, was his separate property, and to which the legal title afterwards conveyed by the patent related; and that which was before separate property, to which he had but an equitable title, was, after the issuance of such patent, still his separate property, and held by him under the legal title conveyed by such patent.

This was in effect so held by this court in the case of *Harris v. Harris*, 71 Cal. 314. In that case, it appears that the defendant, while a widow and in the occupation of certain land, filed in the United States land-office a declaratory statement of her intention to pre-empt the same. She afterwards married the plaintiff in that action, and thereafter they both jointly occupied and farmed the premises until she made final proof of her pre-emption claim in the new name she had acquired by the marriage, and was allowed to make a final entry of the same. The court held that the property was the separate property of the wife, no matter whether the same was paid for with community funds or with money borrowed upon her own credit, and on this point the court, in its opinion by McKinstry, J., said: "In this action for divorce, the plaintiff claims a moiety of the land patented to the defendant, on the ground that the money paid for the government title belonged to the community. 1. Even if it appeared that the money was paid out of community funds, the land would be the separate property of the wife. With full knowledge and consent of the plaintiff, the land was proved up and paid for in her name, and the proof of her occupation and 'declaration' or affidavit was as necessary a prerequisite to the acquisition of the government title as was the payment of the price. The patent is a record which proves the facts which preceded its issue, on proof of which the proper officers of the United States were authorized

to issue it. For certain purposes, the possession of either spouse is the possession of both. But here the pre-emption, declaration, and exclusive occupation of the defendant preceded her marriage with the plaintiff, and constitute part of the acts which culminated in the certificate of purchase and patent. The plaintiff ought not to be permitted to ignore her declaration and possession (without proof of which she could not have received the benefits of pre-emption), and treat the acquisition of the government title simply as an ordinary purchase, made after marriage, with community funds."

What was there said with reference to the effect of the prior settlement and declaration of the pre-emption claimant, as the basis of his right to obtain the subsequent title, applies with equal force to this case; and with much greater reason can it be said that the subsequent acquisition of the legal title was not one of purchase, made with community funds, as the title thus received was more in the nature of a gift from the government, because of the performance by petitioner of the conditions prescribed by the homestead laws in relation to residence upon and cultivation of the land. The fact that during a small portion of the time he was thus required to reside upon it the deceased was also living there with him as his wife would not deprive him of the equitable right which he had acquired to such land before marriage by reason of his previous entry and settlement, and convert it into community property. The cases of *Lake v. Lake*, 52 Cal. 428, and *Barbet v. Langlois*, 5 La. Ann. 212, also sustain this conclusion.

2. The homestead selected by the deceased under the laws of this state was not abandoned by the subsequent agreement between petitioner and deceased for its division between them. This agreement was not recorded by either of the parties, and if it should be conceded that it was otherwise sufficient as a declaration of abandonment, the failure to record it rendered it ineffectual for that purpose. (Civ. Code, sec. 1244.) The deed of

the premises executed by petitioner to deceased February 23, 1888, operated to vest the legal title thereto in the wife as her separate property, but did not constitute an abandonment of the homestead. (*Burkett v. Burkett*, 78 Cal. 310; 12 Am. St. Rep. 58.) We do not understand that there is any claim here that this deed was not executed, — that is, signed and delivered by petitioner; and this being so, its effect was to change the ownership of the land which it purported to convey from separate property of the petitioner to separate property of his wife, subject to the homestead thereon, which then became a homestead upon the separate property of the wife. The subsequent deed made by the deceased to the petitioner, in pursuance of the agreement for a separation and division of the property, reinvested him with the title to the 110 acres described therein, while his deed made to her at the same time was in effect a confirmation or further assurance of title to the 50 acres which it purported to convey; so that, as a result of the execution of all the deeds mentioned, 110 acres of the land in controversy remained the separate property of the petitioner, and the other 50 acres became the separate property of his wife, and all subject to the homestead which had been placed thereon, and never abandoned.

This being so, it only remains to consider the nature of this homestead, so far as it affects the fifty acres of which the deceased was the owner. Can it be said, in view of the facts as we have stated them, that this homestead was selected by her from her separate property, within the meaning of section 1474 of the Code of Civil Procedure? It is clear to us that this question must be answered in the negative. It is true, the declaration of homestead was made and recorded by her, but this was at a time when all of the land in controversy was the separate property of her husband, the petitioner, and the subsequent acquisition by her of the title to fifty acres thereof as her separate property did not have the effect to change the prior declaration into a selection by her of a homestead from her separate property. When the statute speaks of the

selection of a homestead "from the separate property of the person selecting or joining in the selection of the same," it has reference to the status of the property as separate property at the time when the selection is made; for only in such case can there be properly imputed to the person making the selection an intention to dedicate his or her property for homestead purposes, and thus to vest in the other spouse an estate therein, which, upon the contingency of survivorship, will ripen into an absolute title to the land so dedicated. It would be subversive of the object and purpose of this law to hold that the wife's subsequent acquisition of title to property, from which she selected a homestead when it belonged to her husband, could be made to relate back and give to her former act in selecting such homestead an intention and purpose which did not in fact then accompany it.

It follows from these views, that the court erred in setting apart to petitioner absolutely, and as his property, the fifty acres which he conveyed to his wife in her lifetime. Such property is to be treated as if the homestead thereon had been selected without her consent, and as vesting in her heirs, "subject to the power of the superior court to assign it, for a limited period, to the family of the deceased." (Code Civ. Proc., sec. 1474.)

The deceased left no children, and it is not shown that the father made his home with her, and that his circumstances were such that she was, at the time of her death, under any moral or legal duty to support him. This being so, the petitioner himself may be regarded as constituting the family of deceased, within the meaning of section 1474 of the Code of Civil Procedure. It is true that the word "family," in its ordinary signification, refers to two or more persons, and as used in the section just referred to, will include those living under the same roof as kindred or dependents, and under one head, thus constituting a family, as that term is generally understood; but this word, as used in the statute concerning probate homesteads, is not to be so restricted in its meaning as

to exclude the only survivor of the family of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use.

Upon the evidence, the petitioner was entitled to a decree setting apart to him as his own property the 110 acres referred to, and it was within the discretion of the court to assign to him, for such limited period as it might deem proper, the 50 acres of which deceased was the owner. The right to the order assigning to him for a limited period this fifty acres is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it.

4. In the bill of exceptions, as originally settled, there was no specification of the particulars in which it was claimed that the findings and decree of the court are not sustained by the evidence. After the appeal herein was taken, the judge of the superior court allowed the bill of exceptions to be amended by inserting such specifications. This action of the judge was proper in this case, as the appeal here is from a decision which was made before the bill of exceptions was settled, and the effect of the amendment is simply to enable this court to review the decision of the lower court, in view of all the facts which that court had before it when it made such decision. (Hayne on New Trial and Appeal, sec. 160; *Valentine v. Stewart*, 15 Cal. 396; *Loucks v. Edmondson*, 18 Cal. 204.)

The order appealed from is reversed.

[No. 14861. Department Two. — July 23, 1892.]

**MYER SIEGEL, AN INSOLVENT DEBTOR, RESPONDENT,
v. HIS CREDITORS, APPELLANTS.**

INSOLVENCY — DISCHARGE OF INSOLVENT — DEBT CREATED BY FRAUD. —

The fact that a particular debt of an insolvent debtor was created by fraud is no ground for refusing a discharge from other debts.

ID. — BOOKS OF ACCOUNT — CONSTRUCTION OF INSOLVENT ACT. — The purpose of section 49 of the Insolvent Act, providing that a final discharge in insolvency may be refused when the debtor has not kept proper books of account, is to require every merchant or tradesman to so keep his books that any competent person, by an examination of them, can ascertain and determine the real condition of his affairs; and if they are so kept, though imperfect, inartistic, and inaccurate in unimportant particulars, they will be treated as proper books of account, within such section.

ID. — ACCOUNTS OF OUTSIDE MATTERS. — PROPRIETY OF BOOKS. — Though a trader should be held to the utmost good faith and reasonable care in keeping accounts of his business as such, yet he is not required to enter in his books accounts of outside matters; and the question whether his books were "proper" or not is one to be determined in each particular case by the facts and circumstances there shown.

ID. — ACCOUNTS OF MONEY BORROWED — REPAYMENT — DISCHARGE OF INSOLVENT. — A discharge in insolvency should not be denied on the ground that the debtor failed to keep proper books of account, where the only fault found with the books is, that he did not keep in them, in the name of one of his creditors, an account of certain small sums of money borrowed from him, from time to time, during a period of eighteen months, and it does not appear that there ever were any other business transactions between the parties, and the small loans were paid back within two days, and the payments entered in the bank-book kept by the debtor in his books.

APPEAL from a decree of the Superior Court of Los Angeles County granting a final discharge in insolvency.

The facts are stated in the opinion.

Graff & Latham, for Appellants.

The fraud committed by respondent was the obtaining goods from his creditors under false pretenses, and is sufficient to prevent a discharge. (*Mayewski v. His Creditors*, 40 La. Ann. 94.) The application for a discharge should have been denied, because of the failure of the insolvent to keep proper books of account. Proper

books of account are such books as will enable another merchant, a creditor of the insolvent for instance, to see the financial status of his debtors. (*In re Gay*, 2 Nat. Bank. Reg. 358.) If books of recognized purpose are kept, they must be kept so as to show that which they are designed to indicate. The law requires the condition of the business to appear clearly from the books, and not from outside sources. (*In re Garrison*, 7 Nat. Bank. Reg. 287.) If the ledger account had been accurately kept, a creditor could have seen at a glance the condition of the business, and acted accordingly. (*In re Good*, 78 Cal. 399.) The question is, whether the insolvent did all that a prudent business man, intending to keep his account accurately, would naturally do. (*Hammond v. Coolidge*, 3 Nat. Bank. Reg. 273.) A cash account is necessary to an understanding of a trader's business. No account was kept of the receipts from N. Siegel. And the omission of this entire set of entries will preclude a discharge, even though accounts of other cash receipts were kept. (*In re Gay*, 2 Nat. Bank. Reg. 358; *In re White*, 2 Nat. Bank. Reg. 590.)

Robarts & Robinson, for Respondent.

The application for a discharge was properly granted. (*Herrlich v. McDonald*, 80 Cal. 472; *In re McEachran*, 82 Cal. 219; *Dyer v. Bradley*, 89 Cal. 557.) The insolvent's failure to enter in his books small loans of money from N. Siegel, borrowed from time to time, and repaid within two days of the loan, and no single one exceeding seventy-five dollars, was not a failure to keep proper books. It is sufficient if the bankrupt kept books of account such as his business required, and the accidental omission of entries is not conclusive of his not having kept proper books. (*In re Burgess*, 3 Nat. Bank. Reg. 197.) The object of the requirement of the act that merchants and tradesmen shall have kept proper books of account in order to be entitled to a discharge in case of bankruptcy is, that the debtor himself, or his creditors, might at any time ascertain

his financial condition from an examination of his books. The test as to whether the books which were kept, when, as in this case, some books were kept, were "proper books of account," within the meaning of the act, is, whether a competent accountant could, from the books themselves, ascertain the debtor's financial condition. If that can be done, then the form in which they were kept is of no importance. (*In re Archenbrow*, 12 Nat. Bank. Reg. 18; *In re Reed*, 12 Nat. Bank. Reg. 390.) The mere fact that the insolvent's books were not entirely accurate ought not to militate against his discharge. (*In re Winsor*, 16 Nat. Bank. Reg. 156.)

BELCHER, C. — The respondent filed his petition in insolvency on the twenty-first day of May, 1890, and was thereupon adjudged to be an insolvent debtor. In due time he applied to the court for a discharge from his debts, and two of his creditors, Walter M. Patrick and Jacoby Brothers, opposed the discharge. The specifications of the grounds of opposition, so far as they need be stated, were that the respondent had been guilty of fraud, contrary to the true intent of the Insolvent Act, in that on the 5th of April, 1890, he, by false and fraudulent representations as to his financial standing, induced Patrick Brothers, the assignors of said Walter M. Patrick, to sell him certain goods, of the value of ninety-five dollars, on a four-months credit, which had not expired when he filed his petition in insolvency, and that he knew said representations to be false, and made them with the intent to deceive and defraud said Patrick Brothers; and also that respondent, for eighteen months prior to the filing of his petition in insolvency, was a retail dealer in boots and shoes, and did not during that time keep proper books of account.

After trial, the court found, upon the issues raised by the pleadings, among other things, that the respondent obtained from Patrick Brothers goods of the value of ninety-five dollars, on a four-months credit, as alleged, but that it was not such a fraud as would prevent

the granting him a discharge from his other debts; and also, that respondent was a retail dealer in boots and shoes for the period of eighteen months immediately preceding the filing of his petition in insolvency, and that during that period, from time to time, he borrowed from one Nathan Siegel sums of money, in the aggregate amounting to \$1,205; that no one of the sums so borrowed amounted to more than seventy-five dollars, and that each of the said sums was borrowed for a short time, and was repaid within two days; that no account of the said loans was kept on his books in the name of Nathan Siegel, "nor any account thereof, except that the items of cash paid out to the said Nathan Siegel in payment of said loans were entered in the bank account kept by said Myer Siegel on his books of said business"; that otherwise respondent kept proper books of account, and that his failure to enter on his books, to the particular account of Nathan Siegel, the said temporary loans, was not such a failure to keep proper books of account as would authorize the withholding the discharge.

A decree was accordingly entered discharging the respondent from all his debts, which, under the insolvent law of this state, were provable against his estate, and which existed on the twenty-first day of May, 1890, except the said debt of ninety-five dollars due to Patrick Brothers.

From this decree the opposing creditors appealed, and have brought the case here for review on the findings.

Section 49 of the Insolvent Act provides that no discharge shall be granted to an insolvent debtor if he has done or failed to do certain specified things, and, among others, if he "has been guilty of fraud contrary to the true intent of this act"; and section 52 provides that "no debt created by fraud or embezzlement of the debtor . . . shall be discharged under this act, but the debt may be proved; and the dividend thereon shall be a payment on account of said debt."

Upon the authority of these sections, and the decisions of the courts in regard to similar provisions found in

the federal bankrupt act, it was decided by this court in the case of *In re McEachran*, 82 Cal. 219, that the fact that a particular debt was created by fraud was not ground for refusing a discharge from other debts; and the same doctrine was again declared in the case of *Dyer v. Bradley*, 89 Cal. 557.

The fraud of which the respondent here was found guilty is not included in any of the grounds specified in section 49 for withholding a discharge, unless it is included in the clause quoted. Appellants, however, contend that that clause was intended to cover a case like this; that it was not in the bankrupt act; and that it must have been overlooked in making the decisions above referred to, and hence that those decisions should be reconsidered and overruled.

We do not think this contention should be sustained. It is true that the clause quoted is not found in the bankrupt act; but in our opinion, it was not intended by it to change the rule many times declared by the bankruptcy courts in cases like this. It seems rather to refer to frauds which affect the mass of the creditors, and not some individual creditor alone. Nor was this clause overlooked when the opinions in the cases criticised were written. Those decisions were mainly rested upon section 52, which seems plainly to imply that a discharge may be granted, notwithstanding there may be some debt which should be excepted from its operation, because it was fraudulently contracted.

Appellants also contend that the discharge should have been denied, because respondent had failed to keep proper books of account; but the only fault found with his books is, that he did not keep in them, in the name of Nathan Siegel, an account of certain small sums of money borrowed from him, from time to time, during a period of eighteen months. It does not appear that there were ever any other business transactions between the parties, and the court finds that the small loans were paid back within two days, and the

payments were entered in the bank account kept by respondent in his books.

One of the grounds specified in section 49 for refusing a discharge is, "if being a merchant or tradesman, he [the debtor] has not kept proper books of account."

The evident purpose of this provision was to require every merchant or tradesman to so keep his books that any competent person, by an examination of them, could ascertain and determine the real condition of his affairs; and if they be so kept, though imperfect, inartistic, and inaccurate in unimportant particulars, they will be treated as "proper books of account."

Undoubtedly a trader should be held to the utmost good faith and reasonable care in keeping accounts of his business as such; but he is not required to enter in his books accounts of outside matters. (*In re Good*, 78 Cal. 399.) The question, then, as to whether books are "proper" or not is one to be determined in each particular case by the facts and circumstances there shown.

Here the testimony is not brought up in the record, and we have only the findings to look to. The presumption is, that every decision of a trial court is correct, unless error clearly appears. Looking, then, at the findings, does it clearly appear that the court below erroneously reached the conclusion that respondent's books were not so improperly kept as to warrant the withholding his discharge?

We think not. So far as we can see, the small sums of money borrowed from time to time may have been for purposes wholly outside the boot and shoe business; and if not, the books, notwithstanding the failure to enter those items, may have sufficiently shown the real condition of respondent's business affairs as a trader.

In the case of *In re Good*, 78 Cal. 399, cited by appellants, it appeared that the insolvents borrowed ten thousand dollars to enable them to commence and continue their business, and that the money so borrowed constituted their capital stock. No account of this borrowed capital was entered in the books. As kept, the books

showed that the firm was in good condition, when in fact it was utterly insolvent. Under these circumstances, it was held that "proper" books were not kept, and that a discharge was properly denied by the trial court. That case is not in point here.

In our opinion, the decree or order appealed from should be affirmed.

VANOLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SHARPSTEIN, J., DE HAVEN, J., McFARLAND, J.

[No. 14660. Department Two. — July 28, 1892.]

**ROBERT WATT ET AL., DIRECTORS OF THE STOCKTON
STATE INSANE ASYLUM, APPELLANTS, v. CHARLES
BRADLEY, ADMINISTRATOR, ETC., RESPONDENT.**

CHANGE OF PLACE OF TRIAL — AFFIDAVIT OF MERITS — DEFECTIVE TITLE OF COURT. — An affidavit of merits, upon a motion for a change of venue made by a defendant, is not insufficient because of the omission of the names of the defendants from the title of the action, where the notice of motion states that the motion will be made "upon the affidavit and demand of defendant to change the place of trial, annexed and served with said notice, and upon said notice and all the papers and pleadings on file in said action," and both the notice and demand were duly entitled in the action, and the affidavit was filed with the notice.

12. — SUFFICIENCY OF AFFIDAVIT — BELIEF OF ADVICE OF COUNSEL. — An affidavit of merits upon a motion for a change of venue, which alleges that the affiant fully and fairly stated all the facts relating to the action to his counsel, and that he is advised by him that he has a good, substantial, and complete defense on the merits of the action, is not defective because of failing to allege that the affiant believed the advice of his counsel.

APPEAL from an order of the Superior Court of San Joaquin County granting a change of venue.

The facts are stated in the opinion.

Carter & Smith, for Appellants.

B. F. Thomas, for Respondent.

VANOLIEF, C.—This action was commenced in the county of San Joaquin to recover \$3,175.35 for medical attention, nursing, support, etc., alleged to have been furnished to the wife of defendant's intestate in said asylum, situate in said county, at the request of said intestate.

On motion of defendant, the court ordered a change of the place of trial from the county of San Joaquin to the county of Santa Barbara, on the alleged ground that defendant was a resident of the latter county. The plaintiffs appeal from this order, and contend that the affidavit of defendant upon which the order was made is insufficient. The following is a copy of the affidavit:—

"In the superior court of the county of San Joaquin, state of California.

"Robert Watt, Arthur Thornton, H. T. Dorrance, Obed Harvey, and R. S. Johnson, as the board of directors of the Stockton State Insane Asylum, plaintiffs.

"State of California,
"County of Santa Barbara. } ss.

"Charles Bradley, being first duly sworn, deposes and says that he is the defendant in the above-entitled action.

"That he now is, and at the time the above-entitled action was commenced, and for twenty years prior thereto had been, a resident of the county of Santa Barbara, state of California, and was such resident when the summons in said action was served on him, which service was in said Santa Barbara County.

"That I have fully and fairly stated the case in this action, and fully and fairly stated all the facts relating to such action, to my counsel and attorney in said action, B. F. Thomas, an attorney at law, residing in the city and county of Santa Barbara, state of California, and after such statement to my said attorney, I am advised by him that I have a good, substantial, and complete defense on the merits of said action.

"CHARLES BRADLEY."

1. It is contended that the affidavit does not intelligibly refer to this action, because the title of this action is not fully stated in the affidavit.

The bill of exceptions shows that the notice of the motion "stated that said motion would be made upon the affidavit and demand of defendant to change the place of trial, *annexed and served with said notice*, and upon said notice and all of the papers and pleadings on file in said action." Both the notice and demand "were duly entitled in the action," and the affidavit was filed with the notice. Therefore, the reference in the affidavit to the "above-entitled action" must have been understood to refer to the title of the action stated in the demand, and in the notice to which the affidavit was annexed and with which it was served. This was sufficient, under section 1046 of the Code of Civil Procedure, which provides that "an affidavit, notice, or other paper, without the title of the action, . . . or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action."

2. The only other objection to the affidavit is, that it fails to state that the affiant *believes* the advice of his counsel, that he had "a good, substantial, and complete defense on the merits of said action."

It is enough that he fairly and fully stated the facts of his case to his attorney at law, and that upon that statement his attorney advised him, *as matter of law*, that those facts constituted a meritorious defense to the action. He was entitled to act upon the advice of his attorney as to what was the law applicable to those facts, unless it appear that he had reason to believe the advice was not given in good faith; for the presumption is, that the advice was asked and given in good faith, and that the defendant confided in it, if nothing appear to the contrary. What is the law applicable to a given state of facts is rather a matter of opinion than of belief, as to which the opinion of the non-professional client is of so little consequence that a court would not act upon it for any purpose.

I find nothing in any of the cases cited by counsel opposed to these views, and therefore think the order should be affirmed.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

[No. 14926. In Bank. — July 28, 1892.]

HENRY WIEBOLD ET AL., RESPONDENTS, v. J. J. RAUER ET AL., APPELLANTS, AND J. J. RAUER, APPELLANT, v. HENRY WIEBOLD ET AL., RESPONDENTS.

APPEAL — UNDERTAKING — DEPOSIT OF MONEY — MOTION TO WITHDRAW DEPOSIT. — A party appealing to the supreme court, who has deposited in the trial court the amount of money required to be deposited by section 948 of the Code of Civil Procedure in lieu of an undertaking, will not be allowed, upon a motion therefor in the supreme court, to withdraw the money deposited in the trial court, and file an undertaking upon appeal in lieu thereof.

MOTION in the Supreme Court for leave to file an undertaking upon appeal, and to be allowed to withdraw money deposited in lieu of such undertaking.

The facts are stated in the opinion of the court.

G. H. Perry, for Appellants.

W. C. Kennedy, for Respondents.

PATERSON, J.—This is an application for an order permitting appellants to substitute undertakings in place of the money deposited in the court below in lieu of undertakings on appeal.

Undertakings were filed in the court below in due time after notice of appeal, but exception was taken by respondents to the sufficiency of the sureties therein.

On the day fixed for the justification of the sureties, the latter failed to appear before the judge of the court below. Thereafter, and in due time, the appellant deposited the amount of the judgment appealed from, and three hundred dollars in addition thereto, which, under section 948 of the Code of Civil Procedure, was equivalent to the giving of sufficient undertakings.

The petitioner has presented to this court undertakings in due form, and asks to have the same approved and filed, and to be allowed to withdraw the money deposited in the court below.

The statute gives an appellant the right to perfect his appeal and secure a stay of proceedings in the judgment, either by giving certain undertakings, or by depositing in the court below the amount of the judgment appealed from, and three hundred dollars in addition thereto. The appellant chose the latter proceeding, and by depositing in the court below the sum required by the statute perfected his appeal. There is no statutory authority for the order which he now requests the court to make; but assuming that the court has the discretion to allow him to withdraw his deposit and give a new undertaking, we have no disposition to exercise that discretion in his favor. The court is already heavily burdened with multifarious original proceedings not usually imposed upon appellate courts, and we have no desire to increase them by establishing a precedent for another, and especially one a denial of which affects no substantial right of either party to the appeal. If the motion were granted and a new undertaking were filed here, the respondent might be compelled to again examine into the question of the sufficiency of the sureties on the undertaking, give notice of exception, and to appear before the judge at the time and place of justification. This would be manifestly unjust to him. The appellant has made his choice of procedure, and having had the benefit of it, should not now be allowed to retract and file undertakings. The only prejudice he can suffer by a

denial of this motion is being deprived of the use of the money until the appeal is determined.

Motion denied.

BEATTY, C. J., DE HAVEN, J., MOFARLAND, J., HARRISON, J., and SHARPSTEIN, J., concurred.

[No. 14711. Department Two. — July 25, 1893.]

**THE LOS ANGELES CEMETERY ASSOCIATION,
APPELLANT, v. THE CITY OF LOS ANGELES,
RESPONDENT.**

DEDICATION OF STREET — GRANT UPON CONDITIONS — PUBLIC USE — FORFEITURE — NEGLECT TO GRADE STREET. — Land granted to a city by a corporation, in pursuance of a resolution of the directors of the corporation granting it for a public road and highway, on the condition that a fence thereon be removed and reset on the line of the road at the expense of the city, and that the street be graded at the city's expense, becomes a public street, subject to the conditions named, upon its acceptance and user by the city; and the city does not forfeit its right to use it as a public street simply because it does not grade it when required to do so by the corporation, but it must be apparent that the city will not grade it at its expense, or at all, before the corporation can reclaim the land.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

M. C. Hester, and Judson, Hester & Wood, for Appellant.

The permission under which respondent took and used this land did not constitute a dedication for any purpose. It is well established in this state, as elsewhere, that where there is no grant in writing, a dedication of land can only be established by proof of acts on the part of the owner of the fee which manifest clearly and unequivocally the intention of the owner to make such dedication. (*Harding v. Jasper*, 14 Cal. 648; *San Fran-*

cisco v. Canavan, 42 Cal. 553; *People v. Reed*, 81 Cal. 77; 15 Am. St. Rep. 22; *People v. Blake*, 60 Cal. 503; *Quinn v. Anderson*, 70 Cal. 456; *Hayward v. Manzer*, 70 Cal. 479; *Eureka v. Croghan*, 81 Cal. 525; *Griffiths v. Galindo*, 86 Cal. 196; *Latham v. Los Angeles*, 87 Cal. 519; *Grube v. Nichols*, 86 Ill. 92; *Hogue v. Albina*, 20 Or. 182; *McCormack v. Mayer*, 45 Md. 524; *Shellhouse v. State*, 110 Ind. 513; *Holdane v. Cold Spring*, 21 N. Y. 477; *Towsdale v. Portland*, 1 Or. 405; *Shreveport v. Drain*, 16 So. Rep. 656 (La.); Angell on Highways, sec. 153.)

O. McFarland, for Respondent.

The public have a right to rely on the conduct of an owner as expressing his intent, and if his acts are such as would lead a prudent man to infer an intent to dedicate, and they are so received and acted on by the public, the owner cannot, after acceptance by the public, recall the appropriation. (Elliot on Roads and Streets, 92, 93, 98, and authorities cited; *San Leandro v. Le Breton*, 72 Cal. 175; *Archer v. Salinas City*, 93 Cal. 43.) The fact that the city set back the fence, repaired and worked upon the street, passed ordinances establishing the grade over the strip, and lastly, as admitted by appellant, the public used the strip, and traveled it constantly as a public street from 1885 until now, shows conclusively an acceptance of it as a street. Any of these acts constitute an acceptance. (*Sawyer v. San Francisco*, 50 Cal. 375; *People v. Pope*, 53 Cal. 451; *Visalia v. Jacob*, 65 Cal. 436; 52 Am. Rep. 303; *Yolo Co. v. Barney*, 79 Cal. 375; 12 Am. St. Rep. 152.) The subject of dedication by the owner and acceptance by the public are fully discussed and passed upon in *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22; *Eureka v. Croghan*, 81 Cal. 524; *Phillips v. Day*, 82 Cal. 24; *Eureka v. Armstrong*, 83 Cal. 623; *People v. Hibernia S. & L. Soc.*, 84 Cal. 634; *Archer v. Salinas City*, 93 Cal. 43.

FOOTE, C.—This action was brought to quiet title to a strip of land in the city of Los Angeles.

The plaintiff, a corporation formed for cemetery purposes, owned about seventy acres of land in the city aforesaid, which included that in controversy here. Its board of directors passed a resolution which ran thus:—

“Aug. 25, 1885. The board held a special meeting this date. All the directors, to wit, A. H. Judson, V. Ponet, I. W. Lord, Fred. Dohs and A. E. Pomeroy, being present. It was moved and carried that a strip of land forty feet in width off and along the south line of the present Evergreen Cemetery lands, and being the south line of lots 1 and 2 in block 73, Hancock's survey, be granted for a public road and highway, on the condition that the fence be removed and reset on the line of the road, said work to be done at the expense of the city, and also that the street be graded at the city's expense. On motion, meeting adjourned.

“Attest: A. E. POMEROY, Sec.”

The president of the corporation, A. H. Judson, on the 7th of September, 1885, made a conveyance of the land described in the resolution to the defendant, which, after describing the land, reads thus: “Said piece of land being for the purpose of a street or highway; and in the event of its ceasing to be used as such public street or highway, the said land to revert to the said corporation grantor. Grantor reserving the right to remove the fence on said land at any time within six months from the date of the acceptance of this deed.”

The defendant, in pursuance of the resolution, removed the fence, and within a very short time after the 7th of September, 1885, the strip of land began to be and has been ever since used for public travel, and in the year 1887 the defendant, by its proper officers, changed the name of this strip of land from Aliso Avenue Extension to First Street; it also appears that the property owners on the side of this strip, opposite the cemetery property from which it was taken, deeded to the city certain land which was also used as part of this public street.

It further appears that the city by ordinance estab-

lished the grade of this land as a public street. And that on the 30th of September, 1885, the conveyances of these lands, including that in controversy here, were presented to its "council," and referred to the board of public works, and that on recommendation they were accepted and ordered filed for record with the recorder.

There has been work done many times upon this road by the city in the way of repairing, fixing, and putting it in order for travel, but it has not yet been graded. And the removal of the fence by the defendant was shortly after the 7th of September, 1885, and under the plaintiff's direction.

There was also evidence that the words "at the city's expense," in the resolution of the board of directors of the plaintiff, were written some time after the meeting at which the resolution was passed, although the board had intended it in the beginning to be placed in the resolution as passed.

The findings of the court were to the effect that the plaintiff was not the owner of the land in fee, and had not been such owner since the 11th of September, 1885; that the defendant at the time of the beginning of this action was and now is the owner of the strip of land described in the complaint, for the purpose of using it as a public street, and of permitting the public to use it as such, subject to the conditions subsequent that it shall revert to the plaintiff in fee-simple as its property, and subject to the further condition and charge, that whenever graded for street purposes, the costs and expenses of such grading shall be paid by the defendant and not by the plaintiff; "that said strip of land has been duly dedicated as a public street of said city, and has been accepted as such by the city, subject to said conditions, and has been used as such by the public ever since the year 1885, and still is used as such street."

The conclusions of law are, that the defendant is entitled to judgment for its costs against the plaintiff, and to a decree declaring said strip of land to be a public street, subject to the conditions set out in finding 2, and that

defendant holds title thereto for the purpose of causing the same to be used as a public street, etc. The judgment follows in accordance.

The plaintiff contends that the evidence is insufficient to support the findings.

It may be conceded that the deed of conveyance of the president of the cemetery was defective, and not authorized in some of its recitals, and that the defendant must depend, for the right of possession and use of the land in question, upon the language of the resolution of the board of directors, and the acceptance by the city of the land, and the use of it as a public highway, according to the offer of dedication contained in the resolution of the board of directors. And it may further be conceded, without deciding, that some of the findings are not supported by the evidence in some of their statements. Nevertheless, we are of opinion that the evidence fully sustains the fourth and last finding as to dedication of the land for street purposes, and its acceptance as such, and that finding is perfectly intelligible when construed with reference to such statements in the other findings as are entirely consistent with those of the fourth finding, and supported by evidence.

It makes no difference, therefore, whether the defendant had or not any right to the land except to use it as a public street, and to observe the condition, when it conveniently can do so, of grading the same at its expense.

It does not seem to us that the attempted rescission of the contract by plaintiff could be accomplished until the city had declared or made apparent the fact that it would not grade the street at its expense.

The main idea in the resolution seemed to be to grant the land to the city for street purposes, and to make the city remove the fence, and when it graded the street, to do it at its own expense, and not at that of the plaintiff. It does not seem to be contemplated, if the city did not grade it when required to do so by the plaintiff, that it forfeited its right to use the land as a public street; but

when it is apparent that the city will not grade it at its expense or at all, then the plaintiff might demand the land back.

We perceive no error in the record, and advise that the judgment and order appealed from be affirmed.

BELCHER, C., and VANOLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

Hearing in Band denied.

BEATTY, C. J., dissented from the order denying the hearing in Bank.

[No. 20852. Department Two. — July 23, 1892.]

THE PEOPLE, RESPONDENT, v. F. O. VINCENT, APPELLANT.

CRIMINAL LAW — JURY — CHALLENGE TO PANEL — SECOND VENUE — CHALLENGE TO JURORS RESUMMONED. — The fact that some of the jurors summoned in a criminal case upon a second special *venue* had also been summoned upon the first special *venue*, to which a challenge to the entire panel had been sustained by the court, upon the ground of the bias and prejudice of the deputy sheriff who summoned them, furnishes no ground to a challenge of the entire panel of the second *venue*. Whatever objections might be had to the second panel should be presented as challenges to individual jurors.

ID. — POWER OF COURT TO DIRECT SUMMONS OF JURORS. — Under section 226 of the Code of Civil Procedure, the court may at any time direct the sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury-box; and when from any cause there are no regular jurors to be drawn from, the court may exercise the power granted by said section.

ID. — CHANGE OF VENUE — DISCRETION. — Although the discretion of the trial court in granting or refusing a change of venue in a criminal action is not an arbitrary discretion, yet where its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate court.

ID. — HOMICIDE — DRUNKENNESS — INSTRUCTION. — Upon a prosecution for murder, an instruction to the jury that evidence of drunkenness can

only be considered by them for the purpose of determining the degree of crime, and for such purpose it should be received with great caution, is correct.

1D. — DEATH PENALTY — AMENDMENT OF CODE — PRIOR OFFENSES. — The act of the legislature of March 31, 1891, amending sections 1217 and 1229 of the Penal Code, relating to the time and place for the execution of the death penalty of one convicted of murder in the first degree, does not apply to convictions for offenses committed prior to its enactment.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Henry Hogan, and *S. R. Hart*, for Appellant.

Attorney-General W. H. H. Hart, *Deputy Attorney-General William H. Layson*, *Assistant District Attorney Welsh*, *W. D. Tupper*, and *F. H. Short*, for Respondent.

McFARLAND, J.—Appellant was convicted of the crime of murder in the first degree, and appeals from the judgment, and from an order denying a motion for a new trial.

1. We see no errors in the rulings of the court below in the matter of impaneling the jury.

It appears that the regular *venire* of jurors having been exhausted before the jury was completed, the court ordered a special *venire* to be summoned by the sheriff; that upon the return of the sheriff, the appellant interposed a challenge to the entire panel of jurors summoned upon said special *venire*, upon the ground of the bias and prejudice of the deputy sheriff who summoned them; and that said challenge was by the court sustained. Appellant then interposed a challenge to the regular *venire* of jurors, upon the ground that they had not been drawn in the manner as prescribed in section 205 of the Code of Civil Procedure, and the court also sustained that challenge. The court then ordered a second special *venire* to be issued for one hundred jurors, and upon the return of the sheriff, it appeared that of the one hundred jurors summoned, several were jurors who had also been

upon the first special *venire* to which a challenge had been sustained for bias of the officer who summoned them. Appellant then interposed a challenge to the panel (of the second special *venire*), upon the ground that a part of the panel was composed of persons who were upon the first special *venire*, and for which the challenge for bias of the officer had been sustained as aforesaid; and upon the further ground (as we understand it) that because the drawing of regular jurors for the year was invalid, therefore there could be no valid order for the summoning of special jurors by the sheriff. As to the first point, it is clear that the fact that a few persons summoned on the second *venire* had also been summoned on the first furnished no basis for a challenge to the panel. It is not made a ground for such challenge by the statute. (Pen. Code, sec. 1064.) Whatever legal objections appellant may have had to those persons should have been presented as challenges to individual jurors. As to the second point, it was held in *Levy v. Wilson*, 69 Cal. 111, and other cases, that the court, under section 226 of the Code of Civil Procedure, may at any time direct the sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury-box; and when, from any cause, there are no regular jurors to be drawn from, the very case arises where the court may, without any doubt whatever, exercise the power granted by said section 226.

2. We see no abuse of discretion in the overruling of appellant's motion for a change of venue. It is true that the prosecution filed no counter-affidavits, except as to the employment of assistant counsel; but the only affidavits filed by the appellant on the motion were made by himself and his counsel, which fact distinguishes the case widely from *People v. Yoakum*, 53 Cal. 566, upon which he relies. Moreover, as to the main point of public feeling against appellant in the county in which he was tried, the affidavits are largely upon information and belief; and upon that point, as the motion was not made until several days after the trial

had commenced, the court had witnessed the examination of a large number of jurors. The code provides that "if the court *be satisfied* that the representations of the appellant are true," the motion should be granted; and we certainly cannot say that in this case the court ought to have been so satisfied. It is true that the discretion of a trial court to grant or refuse a change of venue is not an arbitrary discretion,—a mere naked, irresponsible power; but when there has been fair room for the play of such discretion, and its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate court. (*People v. Elliott*, 80 Cal. 296, and cases there cited.) And we see no reason to hold that in the case at bar such discretion was improperly exercised.

3. It is contended by appellant that the court erred in instructing the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution." This instruction and others stating the same principle have been frequently approved by this court in murder cases. (*People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 344; *People v. Belencia*, 21 Cal. 544; *People v. King*, 27 Cal. 507; 87 Am. Dec. 95; *People v. Ferris*, 55 Cal. 588; *People v. Jones*, 63 Cal. 168.) Appellant relies on the recent case of *People v. Phelan*, 93 Cal. 111, in which the said instruction above quoted was held to be erroneous. But that was a case of *burglary*, in which the degrees of the crime are not based at all upon the principle which distinguishes the degrees of murder. Section 22 of the Penal Code provides that "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any species or *degree* of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Now, the degrees of murder are based upon the "intent"—the deliberation or premeditation—

with which the act is done; and therefore it is not improper, in trials for unlawful homicide, to instruct the jury that they can consider intoxication only for the purpose of determining the degree of the crime, because that is telling them in substance that they may consider it in determining "the purpose, motive, and intent" with which the act was committed. But in burglary the degrees of the crime are fixed solely by the point of *time* at which the act was done,—if in the night-time, of the first degree; if in the daytime, of the second degree. Therefore, to tell a jury in a burglary case that they could consider intoxication only in determining the *degree* of the crime would be not only absurd, but to take away from them the right to consider it in determining the "purpose, motive, or intent" with which the accused did the act complained of. Burglary consists in entering a house (or one of certain other buildings mentioned in the code), "with intent to commit grand or petit larceny, or any felony"; and it is apparent to the dullest apprehension that a drunken man might unlawfully enter a house without any intent whatever to commit larceny or felony. And it is equally apparent that a jury, in determining with what intent he entered, might well consider the fact that he was intoxicated; but the "degree" of the crime would have nothing to do with it. The court, in delivering the decision in *People v. Phelan*, 93 Cal. 111, did not consider it necessary to state that they were not dealing with a murder trial.

4. The crime of which appellant was convicted was committed prior to the act of March 31, 1891, amending sections 1217 and 1229 of the Penal Code, relating to the time and place for the execution of the death penalty; but it must be deemed to have been settled by the decision of this court in Bank in the case of *People v. McNulty*, 93 Cal. 427, that such amendments do not apply to convictions for offenses committed prior to their enactment.

The transcript does not contain the evidence, and the

foregoing are the only grounds relied on for a reversal. The record presents no error.

Judgment and order appealed from affirmed.

DE HAVEN, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 14644. Department One. — July 27, 1892.]

MINNIE L. FLEMING, RESPONDENT, v. SAMUEL J. FLEMING, APPELLANT.

DIVORCE — EXTREME CRUELTY — CONSIDERATION OF CIRCUMSTANCES. —

What acts of a spouse will constitute extreme cruelty, within the meaning of the statute providing for a divorce upon that ground, cannot be defined with precision; but each case is to be determined, according to its own peculiar circumstances, by the good sense and judgment of the court or jury, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.

ID. — GRIEVOUS MENTAL SUFFERING — QUESTION OF FACT. — Whether in any given case there has been inflicted grievous mental suffering upon one of the spouses is a pure question of fact to be deduced from all the circumstances of each particular case.

ID. — PLEADING — ATTEMPT AT INTERCOURSE WITH DOMESTIC — PUBLICITY OF CHARGE — INJURY TO WIFE'S HEALTH — CONCLUSIVENESS OF FINDING. — Where a complaint, in an action for a divorce by a wife on the ground of extreme cruelty, alleged that the defendant attempted to have sexual intercourse with their domestic, and that such conduct on the part of the defendant received great publicity by reason of a complaint having been made by the domestic before a magistrate, charging the defendant with assault with intent to commit a rape upon her, and that afterwards he threatened to turn the plaintiff out upon the world penniless unless she would help him to keep the domestic from prosecuting him on the complaint, and that such conduct on the part of the defendant, and the publicity given to it, caused the plaintiff grievous mental suffering, thereby greatly impairing her health, it cannot be said, as a matter of law, that such conduct did not inflict grievous mental suffering upon her, and a finding by the court that it did is conclusive upon appeal, in the absence of evidence in the record.

ID. — PRESUMPTION — INTENTION TO ANNOY WIFE. — Such conduct of the defendant being voluntary and inconsistent with marital integrity, it will be conclusively presumed that he intended the natural and ordinary effect thereof upon his wife; and the law will not condone the offense, upon the ground that the acts imputed to him were not willfully done to annoy or vex the plaintiff, and that he did not suppose any publicity would be given to them, or that his wife would be told about them.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

C. W. Pendleton, and Thomas J. Carran, for Appellant.

The complaint is insufficient, as it does not state that the defendant persisted in a course of immoral conduct, or that he even repeated the act of illicit intimacy charged against him. Generally, a divorce will not be granted for a single act of cruelty. (*Hoshall v. Hoshall*, 51 Md. 72, 75; 34 Am. Rep. 298; *Embree v. Embree*, 53 Ill. 394, 395.) There is no allegation that the defendant acted willfully or consciously to the distress of the plaintiff, or had reason to believe that his conduct would cause her "grievous mental suffering." The injury must be done deliberately; it must be willful. (*Neeld v. Neeld*, 4 Hagg. Ecc. 263; *Miller v. Miller*, 78 N. C. 102, 105; *Kennedy v. Kennedy*, 73 N. Y. 369.) The plaintiff does not claim that cohabiting with the defendant would be dangerous or unendurable to her. This is an essential element of legal cruelty. (*Beyer v. Beyer*, 50 Wis. 254, 257; 36 Am. Rep. 848; *Elmes v. Elmes*, 9 Pa. St. 166, 167.) Neither does it appear that there was any actual or reasonably apprehended injurious effect upon the health of the complaining party. (1 Bishop on Marriage and Divorce, 6th ed., secs. 732, 733 b; *Powelson v. Powelson*, 22 Cal. 362.) The complaint does not contain any proper or sufficient allegation of the effect of the defendant's conduct upon the health of the plaintiff, thus lacking that fact which has been declared by this court to be the final test or criterion of legal cruelty. (*Waldron v. Waldron*, 85 Cal. 256; *Powelson v. Powelson*, 22 Cal. 362.) The allegation that defendant's acts have caused plaintiff "grievous mental suffering" is not a statement of fact, nor of anything from which the court could infer that a case of extreme cruelty existed. (*Smith v. Smith*, 62 Cal. 466; *Waldron v. Waldron*, 85 Cal. 256.) There is nothing charged that even partakes of the nature of

legal cruelty, except the alleged threat, and that is too trifling to be considered a sufficient cause for a divorce, under the allegation of extreme cruelty. (See *Cline v. Cline*, 10 Or. 474; *Miller v. Miller*, 78 N. C. 102.)

John G. Rossiter, for Respondent.

Acts of cruelty need not be persistent before relief and safety can be had by a divorce. (*Mahone v. Mahone*, 19 Cal. 627; 81 Am. Dec. 91; *Smith v. Smith*, 8 Or. 100; *McMahan v. McMahan*, 9 Or. 525; *Graft v. Graft*, 76 Ind. 136; *Kelly v. Kelly*, 18 Nev. 49; 51 Am. Rep. 732; *Pinkard v. Pinkard*, 14 Tex. 356; 65 Am. Dec. 129; *Huilker v. Huilker*, 64 Tex. 1; *Albert v. Albert*, 5 Mont. 577; 51 Am. Rep. 86; *Hooper v. Hooper*, 19 Mo. 355; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773; *Moyler v. Moyler*, 11 Ala. 620; *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108.) Any conduct sufficiently aggravated to produce ill health or bodily pain, though operating primarily upon the mind only, should be regarded as legal cruelty. (*Powelson v. Powelson*, 22 Cal. 358; *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108; *Rice v. Rice*, 6 Ind. 100; *Holdon v. Holdon*, 1 Hagg. 453.) The contention that the complaint is insufficient because containing no allegation that the defendant acted willfully or consciously in injuring the plaintiff is untenable, as it will be presumed that a person intends the ordinary consequences of his voluntary act. (Code Civ. Proc., sec. 1963, subd. 3; *Pardy v. Montgomery*, 77 Cal. 326; *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108.) Nor is it necessary, in determining this point, to inquire from what motive his conduct proceeds. What his object may have been, beyond the carnal and immoral one alleged in the complaint, is immaterial, — it could not have been a good one; nor could it, under any circumstances, be justifiable for him to attempt to have sexual intercourse with his domestic either by solicitation or violence. (*Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108.) The allegation that the conduct of the defendant caused the plaintiff grievous mental suffering, thereby greatly impairing

her health, is a sufficient allegation of the effect of the defendant's conduct upon the health of the plaintiff. (*Haley v. Haley*, 14 Pac. Rep. 94; *Dietrick v. Dietrick*, 14 Phila. 649; *Smedley v. Smedley*, 30 Ala. 714.)

PATERSON, J. — This is an action for divorce on the ground of extreme cruelty. The material allegations of the complaint are as follows:—

"Plaintiff further alleges that on the evening of the eleventh day of March, 1891, the plaintiff and defendant left their home in South Pasadena, in this county, for the purpose of attending a lecture in the city of Los Angeles; that they left their infant child at their said home in the care of their domestic, one Annie Peterson; that after said lecture the plaintiff and her sister went to the house of a friend in the said city of Los Angeles for the purpose of spending the night there; that the defendant returned to their said home and found the said Annie Peterson in bed and asleep; that said defendant then and there entered the bed of said Annie Peterson, and attempted to have sexual intercourse with her; that he tried to persuade her that it would not be wrong for him and her to have sexual intercourse together; that he remained in bed with the said Annie Peterson for upwards of two hours before retiring to his own room; that this conduct on the part of defendant has received great publicity by reason of a complaint having been made by the said Annie Peterson before a magistrate in the city and county of Los Angeles, charging the defendant with having at said time and place assaulted her with intent to commit a rape upon her; that afterwards the said defendant came to plaintiff and threatened to turn her out upon the world penniless unless she would help him to keep the said Annie Peterson from prosecuting him on the said complaint; that this conduct on the part of the defendant, and the publicity which has been given to it, *has caused plaintiff grievous mental suffering, thereby greatly impairing her health.*"

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute

a cause of action, the demurrer was overruled, defendant offered no further defense to the action, the court upon the proofs taken found the facts alleged in the complaint to be true, and judgment was entered in favor of the plaintiff, dissolving the bonds of matrimony. From this judgment the defendant has appealed, and now insists that the demurrer ought to have been sustained, because the facts alleged are insufficient to support a finding of extreme cruelty.

Our statute provides that "extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

Courts and elementary writers have found it impossible to define with precision what acts will constitute extreme cruelty, and it would be idle for us to review the decisions cited, because they are as variant as the language of the several statutes upon which they were founded. The habits and dispositions of different married persons vary so much that it is impossible to lay down any universal rule for the determination of what indignities should be regarded as grounds of divorce under the statute. The legislature has necessarily employed general words, and left each case to be determined, according to its own peculiar circumstances, by the good sense and judgment of courts and juries. "Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party." (*Barnes v. Barnes*, ante, p. 171.)

We cannot, as matter of law, say that the conduct charged in the complaint did not inflict upon the plaintiff grievous mental suffering. The court below has found as a fact that it did, and it is the province of that court, and not our own, to determine the facts. The evidence is not in the record, and the finding is conclusive. We presume the court considered the character of the parties, and was guided by the statute and its

sense of right and justice, and not by any chivalric sentiment, in awarding a decree to the plaintiff.

The attorneys for appellant attempted to excuse his conduct on the ground that the acts imputed to him were not willfully or deliberately done to annoy or vex the plaintiff,—that he did not suppose any publicity would be given to them, or that his wife would be told about them; but the law will not condone a violation of the marriage obligation on any such ground. His conduct being voluntary and inconsistent with marital integrity, it is conclusively presumed that he intended the natural and ordinary effect thereof upon his wife. He, better than any one else, is supposed to know the effect a disclosure of his acts would have upon her; he took the chances of being found out, and must suffer the consequences. His threat to turn his wife out upon the world penniless, unless she assisted in saving him from a prosecution for his offense, did not indicate any contrition on his part, or that his consideration for the feelings of plaintiff would be any greater in the future than it had been in the past.

Judgment affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 14787. Department Two. — July 27, 1892.]

THOMAS R. MORE, ADMINISTRATOR, ETC., APPELLANT,
v. J. W. CALKINS ET AL., RESPONDENTS.

TRUST DEED — DECLARATION OF TRUST — POWER TO SELL AND CONVEY. —

An instrument which conveys to a grantee named therein the legal title to property described, upon certain trusts which it declares, and which confers upon him the power in execution thereof to sell the property thus conveyed and transmit the legal title to his grantee, is a trust deed.

Id. — DEED TO CREDITOR TO BE PAID FROM PROCEEDS OF SALE — MORTGAGE. — The fact that such deed was made directly to a creditor of the grantor as trustee, and not to a third party, is immaterial upon the question as to whether the conveyance should be treated as a mortgage or a deed of trust, as such question must depend upon the essential character of the instrument as shown by its terms, and not upon whether the gran-

tee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared.

- 12. — DEATH OF GRANTOR — REVOCATION OF POWER OF SALE — FAILURE TO PRESENT CLAIM — CANCELLATION OF DEED.** — The death of the grantor does not operate as a revocation of a power of sale contained in a trust deed, or limit the effect of the deed; and the failure to present to the administrator of the deceased grantor the claims secured by it furnishes no ground for a court of equity to cancel the deed.
- 13. — CONSTRUCTION OF DEED — CONSIDERATION OF PROMISE TO TRUSTEE — APPEAL — LAW OF CASE.** — The construction placed upon a deed of trust by the supreme court, in its decision reversing the judgment and remanding the case for a new trial, holding that a promise to pay ten thousand dollars to the trustee, besides his debts and the reasonable expenses of his administration, was without consideration, is the law of the case, and the question of its correctness will not be considered upon a second appeal.
- 14. — COMPENSATION OF TRUSTEE — REIMBURSEMENT OF EXPENSES.** — A trustee, upon the close of his trust, is entitled to a reasonable compensation for his services in performing his duties under the trust deed, to be fixed by the court, unless the parties can agree in relation thereto, and is entitled to be reimbursed for all expenses incurred by him.

APPEAL from a judgment of the Superior Court of Ventura County.

The facts are stated in the opinion of the court, and in the opinion reported in 85 Cal. 177.

Barclay, Wilson & Carpenter, L. C. McKesby, and W. H. Wilde, for Appellant.

Wright & Day, for Respondents.

DE HAVEN, J. — The plaintiff is the administrator of the estate of Alexander S. More, deceased, and the prayer of the complaint filed in the action is, that a certain trust deed, executed by the deceased in his lifetime, be declared void, and that defendant Calkins be enjoined from selling the land, water ditch, and water rights conveyed by said deed under the power which is given therein. The case was here before. The opinion upon the former appeal is reported in 85 Cal. 177, and the deed referred to is there set out in full.

After the decision upon the former appeal, the plaintiff filed a supplemental complaint, in which it is alleged

that the defendant did not, within the time limited by section 1493 of the Code of Civil Procedure, present the claims secured by said deed to the plaintiff as administrator of Alexander S. More, deceased, and it is averred that the same are barred by sections 1493, 1500, and 1502 of the Code of Civil Procedure.

It was further alleged in the supplemental complaint that after the commencement of the action, the defendant Calkins made a conveyance to one Merton B. Hull of all the property described in the deed executed by deceased, and that said Hull had notice of the pending action, and the plaintiff asked that Hull be made a party defendant, and for a judgment to the effect that the deed from defendant Calkins to said Hull be canceled, and Hull compelled to convey all of said property to the plaintiff, as administrator of the estate of the deceased Alexander S. More, and that all of the claims mentioned in the deed of trust, executed by deceased to defendant Calkins, be declared barred, and that plaintiff be put in possession of all of the property conveyed by said deed. Hull appeared in the action, and joined with the other defendant in answer to the supplemental complaint.

The judgment of the superior court was, that the deed executed by Calkins to his co-defendant Hull be canceled, and it further directed that the property conveyed to defendant Calkins by the deed of trust executed by deceased be sold, and said judgment also determined the amount which the defendant Calkins, as trustee, is entitled to retain out of the proceeds of such sale, in which amount is included the sum of ten thousand dollars, which is provided for in the deed referred to. The plaintiff appeals from the judgment.

1. The instrument which the plaintiff seeks to have set aside is a trust deed. It conveyed to defendant Calkins the legal title to the property described, upon the trusts which it declares, and conferred upon him the power in execution thereof to sell the property thus conveyed, and transmit the legal title to his grantee. (Koch

v. *Briggs*, 14 Cal. 257; 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 480; *Thompson v. McKay*, 41 Cal. 221.)

It is not material that in this case the conveyance was made directly to Calkins, who was a creditor, and not to a third party. Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared. In *Thompson v. McKay*, 41 Cal. 221, the deed was upon a trust to sell or lease the premises conveyed, and after making certain deductions to apply the proceeds to the payment of a promissory note executed by the grantor in favor of the grantee, and the courts said, in declaring the legal effect of this deed: "That the deed from Gowen to Hill conveyed the fee, and that Hill had the power, in execution of the trust, to transmit the legal title to a purchaser, is too plain for debate."

2. The death of the grantor did not operate as a revocation of the power of sale contained in the deed under consideration, or in any manner limit the effect of the deed, and this being so, the failure to present to the administrator of deceased the claims secured by it furnishes no ground for a court of equity to cancel the deed. (*Whitmore v. San Francisco Savings Union*, 50 Cal. 146.)

As the deed made by plaintiff's intestate requires no judicial foreclosure, and the powers and trusts therein declared are in full force, it follows that sections 1493 and 1502 of the Code of Civil Procedure, prescribing the time within which claims must be presented against the estate of a deceased person, and section 1500 of the same code, allowing an action for foreclosure of a mortgage, without presentation of such claim, only "when all recourse against any other property of the estate is expressly waived in the complaint," have no application to the case before us, and the right of the defendant to execute the powers conferred by the deed, and apply the

proceeds arising therefrom to the payment of the debts and charges named in the deed, is not dependent upon a compliance with these sections.

3. The deed provides that out of the proceeds of the sale of the property thereby conveyed, the defendant Calkins shall pay,—“1. The reasonable expenses of the management of said lands and property, and of the execution of these trusts; 2. To the said J. W. Calkins the sum of fifteen thousand dollars, with interest thereon at the rate of ten per cent per annum, together with the additional sum of ten thousand dollars, which the party of the first part hereby agrees to pay the party of the second part, without interest.” etc. The court below, in its decree, allowed to the defendant this last-named sum of ten thousand dollars, without interest, and its action in this respect is assigned as error.

The provision of the deed just quoted was under consideration by this court upon the former appeal, and was construed as follows: “The fact that it appears upon the face of the instrument that payment for all loans and advances, *and compensation for all services*, with extraordinary interest, is provided for, exclusive of the promise to pay ten thousand dollars without interest, tends to corroborate the averment that there was no consideration for the promise to pay the ten thousand dollars. *But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars without interest.*”

The construction thus placed upon the deed has become the law of the case, and the question of its correctness is not open to consideration upon this appeal. (*Table Mountain Co. v. Stranahan*, 21 Cal. 548.) And in view of what was thus said by the court on the former appeal, we think the court was not justified in allowing to the defendant Calkins this sum of ten thousand dollars. The court found in relation to the consideration for this promise to pay this sum as follows: “That the said trust deed, and every part thereof, was and

is supported by a good and valid consideration received by said Alexander S. More, in the execution of said trusts, and that the item of ten thousand dollars mentioned in said deed of trust was a part of the entire transaction, and was a bonus or consideration, in addition to interest on the money provided to be advanced, for the use and benefit of said Alexander S. More, and as part of the consideration for furnishing of the money in said deed of trust provided, and for the services to be rendered and the obligations assumed, as set forth in said deed of trust." In this the court does not find that the defendant Calkins was to furnish any other money, or assume any other obligations, or render any other services, than appears from the deed itself. But if it be true, as the court held on the former appeal, "that payment of all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay the ten thousand dollars," it necessarily follows that unless the promise to pay this ten thousand dollars is founded upon some other consideration than the express agreement of defendant Calkins to furnish the money and assume the other obligations and duties provided for in the deed of trust, the promise to pay this sum must be held to be without consideration, if the law as declared in the former opinion is to be followed; for it was in view of the fact that the court construed the deed as providing in other parts for the payment of everything which the court below finds that defendant was to furnish in the way of money, and for the rendition of all his services as trustee, that upon the former appeal this court said: "But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars, without interest."

As already stated, we are not, upon this appeal, at liberty to review the former opinion, and place upon the deed under consideration any other construction than was given to it there.

The defendant, upon the close of his trust, is entitled to a reasonable compensation for his services in performing his duties as trustee under the deed, and is entitled to be reimbursed for all expenses incurred by him. The compensation will have to be fixed by the court, unless the parties can agree in relation thereto.

The finding of the court as to the amount which defendant Calkins is entitled to retain out of the proceeds of the sale of the property conveyed by the trust deed is not questioned, except as to the item of the ten thousand dollars, already discussed, — that is, his right to retain all the money found due him, except this ten thousand dollars, is not denied, unless he lost his right to retain the same by a failure to present his claim therefor to the executor of the deceased. Nor is there any other objection made to the judgment itself. Under these circumstances, it is not necessary that there should be any new trial of the action.

Judgment reversed and cause remanded, with directions to the superior court to modify its judgment in accordance with this opinion, by striking therefrom the allowance to defendant Calkins of the said sum of ten thousand dollars, and providing in place thereof that he be allowed a reasonable compensation, upon the settlement of the trust, to be fixed by the court.

McFARLAND, J., and SHARPSTEIN, J., concurred.

[No. 14959. In Bank. — July 28, 1892.]

**A. FORNI, RESPONDENT, v. GEORGE M. YOELL ET AL.,
APPELLANTS.**

APPEAL — UNDERTAKING — NEW-TRIAL ORDER NOT REFERRED TO — DISMISSAL — STIPULATION — ESTOPPEL.—Although, as a general rule, an appeal from a new-trial order must be dismissed where the undertaking on appeal from the judgment does not refer to the order, and there is no undertaking on appeal from the order, yet where a respondent stipulated in writing, within sixty days after the overruling of the motion for a new trial, that the appellant had in due time given and filed a good and sufficient undertaking upon appeal in the cause, he is estopped from claiming, after the time for appeal has elapsed, that the appeal must be dismissed because of the failure of the undertaking to refer to the appeal from the new-trial order.

MOTION in the Supreme Court to dismiss an appeal from an order of the Superior Court of Santa Clara County denying a new trial. The facts are stated in the opinion of the court.

William L. Gill, for Appellants.

F. B. Laine, and *Jackson Hatch*, for Respondent.

BEATTY, C. J.—The defendants appealed from the judgment, and from an order denying their motion for a new trial. The plaintiff moves to dismiss the appeal from the order, upon the ground that the undertaking on appeal makes no reference to the appeal therefrom, and consequently, that so far as the order is concerned, the appeal is ineffectual for any purpose. (Code Civ. Proc., sec. 940.)

It is conceded by the appellant that his undertaking as filed was in fact defective in the particular specified, and it is settled by numerous decisions of this court that in such case the appeal must be dismissed, if the respondent has not waived the defect, or done some act by which he is estopped to raise the objection. (*People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100; *Home and Loan Ass'n v. Wilkins*, 71 Cal. 626; *Berniaud v. Beecher*, 74 Cal. 617; *Wood v. Pendola*, 77 Cal. 82; *Schurtz v. Ro-*

mer, 81 Cal. 245; *Crew v. Diller*, 86 Cal. 555; *Pacific Paving Co. v. Bolton*, 89 Cal. 155.)

But it is contended that the respondent in this case has waived the defect in the undertaking, and is thereby estopped to make the objection upon which his motion is based. The order overruling the motion for a new trial was made and entered December 21, 1891, and some time prior to January 30, 1892, the respondent stipulated in writing, among other things, "that the appellant has in due time given and filed a good and sufficient undertaking on appeal in said cause." This stipulation is contained in the original transcript filed in this court on January 30, 1892, and must, therefore, have been signed on or prior to that date, and before the time for appealing from the order had expired."

This fact distinguishes the present case from *Perkins v. Cooper*, 87 Cal. 241. There a similar stipulation was given, but not until the time for appealing from the order had expired, and if the stipulation had been refused, the appellant could not have given a new notice of appeal. But here, if the stipulation had not been given, the defendants had ample time to file and serve a new notice, and it may well be that their reliance on the stipulation prevented them from doing so. Under such circumstances, we think the respondent should not be allowed, after the time for appealing has elapsed, to contradict his former admission.

Motion denied.

DE HAVEN, J., HARRISON, J., GAROUTTE, J., McFARLAND, J., and SHARPSTEIN, J., concurred.

[No. 14893. Department One. — July 29, 1892.]

CHARLES BOHNERT, RESPONDENT, v. JOSEPHINE BOHNERT, APPELLANT.

NEW-TRIAL STATEMENT — SPECIFICATIONS — REVIEW UPON APPEAL. — Where there is no specification of error in a statement on motion for new trial, errors alleged by the appellant to have been committed by the court during the trial will not be considered by the appellate court.

DIVORCE — ADULTERY — PLEA OF CONDONATION — QUESTION OF FACT — CONCLUSIVENESS OF FINDING. — In an action for divorce upon the ground of adultery, where the defendant, after denying the charge of adultery, alleged a condonation by the plaintiff, and his cohabitation with her after the bringing of the action; and the defendant testified that after the commencement of the action she went to a cottage with him at his request, where they undressed and went to bed together, and that they staid there most of the afternoon and had sexual intercourse; and the plaintiff testified that he did not have sexual intercourse with her, as stated by her, nor at any time after the commencement of the action, but did not say whether he had undressed and occupied a bed with her in the cottage, — a finding by the court against the plea of condonation is conclusive. The question of the plaintiff's credibility, and the probability of his statement in view of his failure to deny that he undressed and went to bed with the defendant, as stated by her, are matters for the determination of the trial court.

ID. — RESTORATION TO MARITAL RIGHTS — ACT OF SEXUAL INTERCOURSE. — The requirement of a "restoration of the offending party to all marital rights," under section 116 of the Civil Code, in order to constitute condonation, is not proved by evidence of sexual intercourse alone; and the fact that a wife charged with adultery went to a cottage with her husband at his request, and that they went to her and had sexual intercourse, does not necessarily show forgiveness or intention on his part to take her back to his home and restore her to marital rights.

APPEAL from a judgment of the Superior Court of Siskiyou County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

H. B. Warren, and Gillis & Tapscott, for Appellant.

J. Chadbourne, Clay W. Taylor, and J. V. Brown, for Respondent.

PATERSON, J. — This is an action for divorce, and the custody of a minor child. The court found the charge of adultery to be true as alleged in the complaint, and ren-

dered judgment in favor of the plaintiff, dissolving the bonds of matrimony, and awarding to him the custody of the child.

In their brief, counsel for appellant discuss a large number of errors alleged to have been committed by the court during the trial; but as there is no specification of error in the statement, they cannot be considered. (*Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 427; *Fleming v. Albeck*, 67 Cal. 227; *Pico v. Cohn*, 67 Cal. 258.) The statute provides that "when the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors *upon which the party will rely*." (Code Civ. Proc., sec. 659.) The object of this provision is apparent: it is to enable the adverse party to prepare his amendments without the necessity of going through the statement proposed by the moving party to ascertain what objections, rulings, and exceptions are incorporated therein. Unless the alleged errors are specifically pointed out, they are deemed to have been waived by the moving party. He is bound to state upon what particular errors he will rely for a new trial.

The defendant, after denying the allegations of adultery, alleged that subsequent to the filing of the amended complaint, the plaintiff being fully informed as to the matters alleged therein, freely condoned all offenses committed by the defendant, freely forgave the defendant, and cohabited with her. The court found that the plaintiff did not condone or forgive, nor did he cohabit or have sexual intercourse with her, as alleged in the answer, and that there was not any reconciliation between the parties, or restoration of the defendant to any marital rights. This is the only finding of the court which is attacked as not supported by the evidence.

The defendant testified that after the commencement of the action she went to the hotel kept by the plaintiff; that he requested her to go down to the cottage; that she went to the cottage with him, where they undressed and

went to bed together; that they staid there most of the afternoon, and had sexual intercourse. The plaintiff testified that he did not have sexual intercourse with the defendant, as stated by her, nor at any time after the commencement of the action, but did not say whether he had undressed and occupied the bed with her in the cottage. Appellant insists that upon this state of the evidence the court ought to have found in favor of the defendant, on the defense of condonation.

It has been held that one act of sexual intercourse is conclusive evidence of condonation in case of adultery (*Anonymous*, 6 Mass. 147), although it is not where the offense alleged is extreme cruelty or desertion. (*Gardner v. Gardner*, 2 Gray, 434; *Kennedy v. Kennedy*, 87 Ill. 250.) But however this may be, it is sufficient to say here that the court has found against the defendant on the plea of condonation, and its finding is conclusive. The question of the plaintiff's credibility, and the probability of his statement, in view of the failure to deny that he undressed and went to bed with the defendant, as stated by her, are matters for determination in the court below, and not here.

Furthermore, under our statute, one of the requirements necessary to condonation is "restoration of the offending party to all marital rights" (Civ. Code, sec. 116), and this requirement is not proved by evidence of sexual intercourse alone. The testimony of the defendant, taken as true, does not necessarily show forgiveness or intention on his part to take her back to his home and restore her to marital rights. (*Kennedy v. Kennedy*, 87 Ill. 254.)

Judgment and order affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

[No. 14637. Department Two. — July 30, 1892.]

JOHN D. BROWNLEE, RESPONDENT, v. W. G. RIFFENBURG ET AL., APPELLANTS.

ATTACHMENT — UNDERTAKING FOR RELEASE — RETURN OF EXECUTION — CONDITION PRECEDENT TO ACTION. — Under section 552 of the Code of Civil Procedure, providing that if an execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to sections 554 and 555 of the same code, for the release of property attached, the issuance and return of an execution is a condition precedent to the right to commence an action upon the undertaking.

ID. — DEMAND FOR RETURN OF PROPERTY. — An undertaking for the release of property taken under a writ of attachment in an action, conditioned that the "defendant will, on demand, redeliver such attached property so released to the proper officer," does not limit the right to make the demand to the officer to whom the property is to be delivered, but the party in whose behalf the demand is to be made may himself make it, and it is only necessary that the officer be clothed with authority to receive the property and sell it.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion.

Wellborn, Stevens & Wellborn, for Appellants.

Shaw & Holland, for Respondent.

BELOHER, C. — This action is upon an undertaking, executed by the defendants, for the release of property taken under a writ of attachment, in an action wherein the respondent here was plaintiff, and one W. D. Lewis was defendant.

The court below gave judgment for the plaintiff, and the defendants have appealed from the judgment, and an order denying their motion for a new trial.

The court found that the plaintiff, Brownlee, commenced an action against Lewis, for the recovery of money, in the superior court of San Diego County, and took out and caused to be levied on the property of Lewis a writ of attachment; that after the levy, the defendants here executed and filed in court, for the benefit

of plaintiff, and pursuant to sections 554 and 555 of the Code of Civil Procedure, the written undertaking sued upon; that upon the filing of the undertaking, the court ordered all the property attached to be released and returned to Lewis, and the sheriff thereupon released the same; that such proceedings were afterwards had in the action that the plaintiff recovered judgment therein for the sum of \$524.30, no part of which had been paid; that after the recovery of the judgment, and before the commencement of this action, plaintiff demanded of Lewis that he redeliver the property so levied upon to the sheriff of the county, to be applied to the payment of his judgment, and also demanded of the defendants, in the possession and custody of one of whom the attached property had been left by Lewis, that they redeliver the same to the sheriff, to be applied to the payment of said judgment; that neither Lewis nor the defendants delivered the property to the sheriff, and that upon their failure to do so, plaintiff demanded of defendants that they pay him the full amount of his judgment, which they failed and refused to do; and that no execution was ever issued on the said judgment.

Appellants contend that no action can be maintained upon an undertaking given pursuant to section 555 of the Code of Civil Procedure, until an execution has been issued and returned unsatisfied, in whole or in part; and in support of their contention, they cite section 552 of the same code, which reads as follows: "If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555, or he may proceed as in other cases upon the return of an execution." The argument is, that this section makes the issuance and return of an execution a condition precedent to the right to commence an action.

That the undertaking here sued upon was given pursuant to sections 554 and 555 of the Code of Civil Procedure is alleged in the complaint, recited in the instrument, and found by the court, and it must there-

fore be regarded as a statutory undertaking. This being so, we think the contention of the appellants must be sustained. Section 552, by providing that if the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute, etc., in effect, declares that unless or until an execution is issued and returned, no such prosecution shall be had. If this be not the meaning and purpose of the section, then, so far as we can see, it has no meaning or purpose, and might be stricken from the code without affecting any right or impairing any remedy whatever.

In *Smith v. Fargo*, 57 Cal. 157, the same point was made, and the court said: "In support of the first point, appellant relies upon section 552 of the Code of Civil Procedure; but that section has no application to the case, for the reason that the undertaking was not given pursuant to section 540 or section 555 of the code. It was not a statutory undertaking, and cannot be held valid and binding as such." From this language, the necessary inference would seem to be, that if the undertaking had been a statutory one, given pursuant to the sections referred to, then section 552 would have been applicable and controlling.

Appellants also contend that the demands for the redelivery of the attached property should have been made by the sheriff to whom it was to be delivered, and not by the respondent, and that as made the demands were insufficient. The undertaking was, that the "defendant will, on demand, redeliver such attached property so released to the proper officer," etc. This is also the language of the code (Code Civ. Proc., sec. 555); and in it we see nothing to indicate an intention to limit the right to make demand to the officer. On the contrary, it would seem that the plaintiff, in whose behalf the demand is to be made, might himself make it, and it would only be necessary that the officer be clothed with authority to receive the property and sell it.

It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

HAYNES, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

DE HAVEN, J., McFARLAND, J., SHARPSTEIN, J.

[No. 14596. Department Two. — August 1, 1892.]

F. WIEDWALD, RESPONDENT, v. JAMES H. DODSON ET AL., TRUSTEES, ETC., OF THE CITY OF SAN PEDRO, APPELLANTS.

MUNICIPAL CORPORATIONS — CHANGE OF BOUNDARIES — CONSTRUCTION OF STATUTE — UNREASONABLE EXCLUSION OF TERRITORY — SPECIAL ELECTION — MANDAMUS. — The act of March 19, 1889 (Stats. 1889, p. 356), providing for the changing of the boundaries of cities and municipal corporations, and the exclusion of territory therefrom, was intended to provide for an ordinary reasonable change of the boundaries of a city, and not a means by which a city might be practically disincorporated; and where it appears, in a proceeding thereunder, that the extent and proportion of the population sought to be excluded from a city would leave less than one half the population necessary to form a municipal corporation, the right of an elector and property owner to a writ of mandate to compel the trustees of the city to call a special election, for the purpose of submitting the question of the exclusion of the territory to the electors, will be denied.

ID. — MANDAMUS IN DISCRETION OF COURT — VIOLATION OF SPIRIT AND PURPOSE OF LAW. — The writ of *mandamus* is not wholly a writ of right, but lies to a considerable extent within the sound discretion of the court where the application is made, and should not issue to compel a technical compliance with the letter of the law, in violation of its plain intent and spirit, nor to wrest a statute from its true purpose.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

S. M. White, and Chapman & Hendrick, for Appellants.

The granting or refusing of writs of *mandamus* is largely in the discretion of the court. (High on Extraordinary Legal Remedies, sec. 9; *Spring Valley Water*

Works v. San Francisco, 52 Cal. 117; *Spring Valley Water Works v. Bryant*, 52 Cal. 140.) Now, it is shown that the holding of this election and the exclusion of this territory would take out all the members of the board of trustees except one, and would practically destroy the corporation. In such cases it is in the discretion of the court to refuse the writ, because the parties affected by such a judgment have no opportunity to be heard. (See *High on Extraordinary Legal Remedies*, sec. 9, note 2, p. 12.) The writ should not be granted to compel a technical compliance with the strict letter of the law in disregard of its real spirit. (*High on Extraordinary Legal Remedies*, sec. 9, and notes; *State v. Commissioners*, 26 Kan. 429.)

Wells, Monroe & Lee, for Respondent.

The discretion confided to the court in the matter of *mandamus* is not arbitrary, but must be exercised under the established rules of law, and if, under those rules, the party is entitled to the writ, it must be issued. (*Brooke v. Widdecombe*, 39 Md. 386; *High on Extraordinary Legal Remedies*, 2d ed., sec. 9.)

McFARLAND, J. — The respondent filed a petition in the superior court, praying for a writ of mandate to compel the appellants, as trustees of the city of San Pedro, to call a special election, and submit to the electors of said city the question of excluding therefrom certain territory described in the petition. After a trial, the court rendered judgment granting the writ, and the trustees appeal from the judgment.

The respondent bases the right to maintain this proceeding upon the fact that he is an elector and tax-payer and real estate owner within the city.

The petition for a special election, involved in the case at bar, was filed March 10, 1891; and it appears from the findings that a prior similar petition had been filed on December 11, 1890 (involving exactly the same territory); that said prior petition had been granted by

the trustees, and an election under it had been held on January 12, 1891; that one Anderson had filed a petition in said superior court for a writ of mandate to compel the trustees to declare the result of such election, and to certify to the secretary of state that such result was in favor of the exclusion of such territory; and that said petition for such writ of mandate is still pending and undetermined.

It further appears from the findings that the territory described in the petition to the trustees (in the case at bar) "is nearly the whole of the said city of San Pedro, and that if the said territory should be excluded it would carry with it nearly or quite nine tenths of the population of said city, and four members of the board of trustees, and that the whole number of voters left in the city of San Pedro, if the said territory should be excluded, would not exceed thirty." It appears that at the last municipal election, held in April, 1890, there were 258 votes cast, and that there are five trustees of said city.

Passing other points made by appellants, it is clear that the judgment must be reversed upon the finding as to the extent and the proportion of the population which would be excluded from the city if the judgment were affirmed. The proceeding before the board of trustees was under the statute approved March 19, 1889, entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom." (Stats. 1889, p. 356.) This act was re-enacted, inadvertently perhaps, on March 20, 1889. (Stats. 1889, p. 433.) The act was evidently intended to provide for an ordinary, reasonable change of the boundaries of a city; but it was clearly not intended as a means by which a city might be practically disincorporated. It is based upon the theory that the city whose boundaries are to be changed shall continue its existence, and provides for many things to be done by the city after the change; as, for instance, to levy taxes upon the excluded territory. But by the election which the trustees are

compelled by the judgment in the case at bar to order, if the vote should be in the affirmative there would be excluded from the city "nearly the whole" of its territory, nine tenths of the population, and four fifths of its trustees; and the whole number of voters left would "not exceed thirty." Adding to these thirty voters as many resident non-voters as could be reasonably estimated, there would not be nearly one half the population necessary to form a municipal corporation of the lowest class. This would be, not to change the boundaries, but to practically disincorporate the city. To interpret the statute as contemplating such result would be to violate the maxim, *Qui hæret in litera hæret in cortice*. Counsel for respondent say that it would be difficult to establish a line so as to distinguish the extent of territory and amount of population that may be excluded. That is, no doubt, true; but if we imagine such line drawn with the utmost liberality, we shall still find the case at bar on the wrong side of it. In applying the principle, each case must be determined upon its own facts.

The learned judge of the court below would, perhaps, have adopted these views, if he had not felt constrained by the opinion, expressed in his conclusions of law, that "the court has not discretion to refuse to issue the writ." In this view we think that he was mistaken. We think that the correct doctrine is expressed in High on Extraordinary Legal Remedies, sec. 9, where, speaking of *mandamus*, it is said that "the exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court"; and that "cases may therefore arise where the applicant for relief has an undoubted legal right, for which *mandamus* is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief." (See also *Spring Valley Water Works v. San Francisco*, 52 Cal. 117; *Spring Valley Water Works v. Bryant*, 52 Cal. 140.) And in the second edition of the work, in said section 9, and notes, it is said that the writ should not issue to compel a compliance with the letter against the spirit of the law. In *State v. Comm'rs*

of *Phillips County*, 26 Kan. 419, while the facts were somewhat different from those in the case at bar, the supreme court of Kansas stated the rule as follows: "The writ of *mandamus* is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made (citing authorities); and no court should allow a writ of *mandamus* to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." The case at bar comes within the principle just quoted; it is an attempt to compel a compliance with the letter of the law against its plain intent and spirit. The writ of mandate should not be used to wrongfully wrest a statute from its true purpose.

The judgment is reversed.

DE HAVEN, J., SHARPSTEIN, J., concurred.

[No. 14843. Department One. — August 2, 1932.]

**M. O'SHEA, RESPONDENT, v. N. R. WILKINSON,
GUARDIAN, ETC., APPELLANT.**

APPEAL — PRESUMPTION — JUDGMENT ROLL — CERTIFICATE OF CLERK. —

Upon an appeal from a judgment, it will be presumed, in the absence of a showing to the contrary, that the pleadings, order overruling the demurrer, minutes of the court, findings, and judgment, contained in the transcript, and mentioned in the certificate of the clerk attached thereto as being correct, constitute the judgment roll; and it is not necessary that the certificate should also state that they constitute the judgment roll.

GUARDIAN AND WARD — ACTION — PARTIES — MISJOINDER OF GUARDIAN —

DEMURRER. — A guardian cannot be joined with the ward as a party defendant, where the cause of action affects only the interests of the ward, and he may demur in such case on the ground that the complaint states no cause of action against him.

ID. — APPEARANCE OF GUARDIAN. — The guardian appears in the action simply to manage and take care of the interests of the ward or infant for whom he appears, and does not thereby become a party to the action.

ID. — EFFECT OF DISMISSAL AS TO WARD. — Where an action is brought against an incompetent person, who appears and answers by a general

guardian, and no attempt is made to charge the guardian in his individual capacity, a dismissal of the action as to the ward is in effect a dismissal of the action itself.

APPEAL from a judgment of the Superior Court of Kern County.

The facts are stated in the opinion of the court.

C. C. Cowgill, for Appellant.

Ahern & Fay, for Respondent.

PATERSON, J. — The transcript contains what purports to be copies of the pleadings, order overruling the demurrer, minutes of the court, findings, and judgment, with a certificate of the clerk attached, which states that they are correct, but does not say that they constitute the judgment roll. Respondent claims that we cannot consider matters contained in these papers without a certificate of the clerk that they are copies of the records which constitute the judgment roll. This contention cannot be sustained. The code specifies what documents shall constitute the judgment roll. Except in cases of default, it is made up by attaching together "the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to change of parties, and a copy of the judgment." (Code Civ. Proc., sec. 670.) It is no part of the duties of the clerk to certify that the papers contained in the transcript constitute the record on appeal (Hayne on New Trial and Appeal, sec. 268), although it is the general practice, and is proper for the clerk in his certificate to state that the transcript contains a copy of the judgment roll. In the absence of a showing to the contrary, we must presume that the pleadings, order, findings, and judgment mentioned in the certificate are those which constitute the judgment roll. If they do not, it is an easy matter for the respondent

ent, upon suggestion of diminution of the record, to have the transcript corrected here.

The complaint stated a cause of action against Agnes Stine, an incompetent person, and the summons was served upon her personally. She appeared and answered by her general guardian, Wilkinson, on June 27, 1889. On December 13, 1889, the plaintiff filed an amended complaint. On December 16th, by consent of all parties, the action was dismissed as against the defendant Agnes Stine, and on the same day a demurrer was filed by Wilkinson, on the ground that the amended complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and thereafter Wilkinson filed an answer denying specifically the allegations of the complaint.

The demurrer of Wilkinson to the amended complaint ought to have been sustained; it stated no cause of action against Wilkinson. The complaint showed on its face that he was not the real party in interest. An executor, administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue or be sued without joining with him the persons for whose benefit the action is prosecuted; but a guardian does not belong to any of these classes. The guardian appears in the action simply to manage and take care of the interests of the infant when he is a party to the action, and "is no more a party to the action than the attorney who appears in an action for one who has attained his majority is a party to the suit in which he enters his appearance." (*Emeric v. Alvarado*, 64 Cal. 593; *Justice v. Ott*, 87 Cal. 530.)

It is claimed by respondent that at most there was but a defect of parties, an objection which was waived by a failure to demur or answer on that ground. It is not a case of a mere defect of parties; a dismissal as to the ward was in effect a dismissal of the action itself, because no attempt was made to charge the defendant in his individual capacity, and he could not represent his ward in the action unless she was a party thereto.

There is nothing upon which an amendment can be predicted, and the action must therefore be dismissed. (*Fox v. Minor*, 32 Cal. 111; 91 Am. Dec. 566.)

Judgment reversed, with directions to the court below to dismiss the action.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 14698. Department One. — August 2, 1892.]

ALICE DEHAIL ET AL., RESPONDENTS, v. W. E. MORFORD ET AL., APPELLANTS.

MUNICIPAL CORPORATIONS — WIDENING OF STREET — ORDINANCE NOT COMPLYING WITH STATUTE — INSUFFICIENT SPECIFICATION OF BOUNDARIES — ASSESSMENT — INJUNCTION. — The ordinance adopted by the city of Los Angeles July 8, 1889, for the widening of First Street from the west side of Los Angeles Street to the west line of Alameda Street, which provides that the exterior boundaries of the district of land to be benefited are "all lots and parcels of land fronting on each side of First Street, from the west side of Los Angeles Street to the west side of Alameda Street," does not comply with the provisions of section 2 of the act of March 6, 1889 (Stats. 1889, p. 70), under which the proceedings for the widening were had, which declares that the city council shall pass a resolution "specifying the exterior boundaries" of the district of lands to be affected or benefited thereby; and a sale of lands for the purpose of satisfying an assessment under such ordinance will be restrained by injunction.

ID. — JURISDICTIONAL REQUIREMENTS ESSENTIAL. — In proceedings for the widening of a street, every requirement of the statute which may in any manner benefit the owner must be observed in order to give jurisdiction to the municipality. After the jurisdiction is once acquired, subsequent proceedings can be attacked for only such irregularities as affect substantial rights; but for the purpose of acquiring jurisdiction, every requirement must be regarded as of equal necessity.

ID. — FILING OF OBJECTIONS TO IMPROVEMENT — RIGHT TO OBJECT TO JURISDICTION — WAIVER. — The fact that a property owner, whose land had been assessed for the widening of a street, appeared before the city council and filed objections to the improvement, and afterwards protested against the report of the commissioners, did not operate as a waiver of his right to object to want of jurisdiction in the council over the subject-matter of the improvement.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

— *C. McFarland*, for Appellants.

J. L. Murphey, and *C. L. Stiles*, for Respondents.

HARRISON, J.—The city of Los Angeles adopted an ordinance July 8, 1889, for the widening of First Street from the west side of Los Angeles Street to the west line of Alameda Street, for which certain lands were to be taken, and the costs, damages, and expenses thereof to be paid by an assessment upon other lands to be benefited thereby. Further proceedings were had under the ordinance, culminating in an assessment upon certain lands bordering upon the improvement, which was placed in the hands of the defendant Morford, as street superintendent of the city, for collection; and the defendant having advertised for sale, and being about to sell for the purpose of satisfying said assessment, certain lots of land belonging to the plaintiffs, this action was brought to restrain him from making the sale. The defendants answered the complaint, setting out the proceedings leading up to the assessment, and the proceedings thereunder; and upon the motion of the plaintiffs, the court rendered judgment in their favor upon the pleadings, perpetually enjoining the defendants from making said sale. From this judgment the defendants have appealed.

Section 2 of the act of March 6, 1889 (Stats, 1889, p. 70), under which the proceedings for widening the street were had, declares:—

“Sec. 2. Before ordering any work to be done or improvement made which is authorized by section 1 of this act, the city council shall pass a resolution declaring its intention to do so, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, costs, and expenses thereof.”

The ordinance adopted by the city of Los Angeles for widening said street provides for an assessment to pay

the cost of the improvement, in the following language:—

"Sec. 2. That the exterior boundaries of the district of land to be benefited by said improvement, and to be assessed to pay the damages, costs, and expenses thereof, are as follows: All lots and parcels of land fronting on each side of First Street, from the west side of Los Angeles Street to the west line of Alameda Street; also all of the property of the railroads situated upon said First Street between said points shall also be assessed to pay said costs, damages, and expenses."

This is not a compliance with the provisions of the above section of the statute, for a resolution "specifying the exterior boundaries" of the district to be assessed to pay the cost of the improvement. The only boundaries of the district which are "specified" are the lines of First Street between Los Angeles and Alameda streets, and these, instead of being the "exterior boundaries" of the district to be assessed, are only the boundaries of a tract within the district which is exempted from assessment. There is nothing in the description of the district from which its extent in either direction from First Street can be ascertained, or by which any one can determine the quantity of land which is to be assessed.

A very obvious reason for this requirement of the statute is, that each owner of property within the district may be informed of the extent of territory which is to bear the burden of the improvement, and thus, by calculating the relative burden upon himself, determine whether the burden to be borne by himself will be so disproportionate to the benefit of the improvement that he can make suitable representations to the city council when it comes to act upon the ordinance in pursuance of its resolution of intention. While each owner of property may know the depth and area of his own lot within the district, he is not presumed to know that of the other lot-owners, and consequently cannot know the relative proportion of the expense which he will be called upon to bear, and cannot intelligently make any

objections before the council "to the extent of the district of lands to be affected or benefited by said work or improvement," which by section 4 of the statute he is authorized to make and have considered by it. Irrespective of such reason, however, it is a sufficient reason that the legislature has prescribed this as a requirement to be observed by the city council, and one of the steps to be taken by it before it can have any jurisdiction in the matter; and it is a fundamental principle, in proceedings of this character, that every requirement of the statute which has a semblance of benefit to the owner must be observed, in order to give to the municipality jurisdiction in the premises. After the jurisdiction has once been acquired, subsequent proceedings can be attacked for only such irregularities as affect substantial rights, but for the purpose of acquiring jurisdiction every requirement must be regarded as of equal necessity.

The plaintiffs did not waive their right to object to this want of jurisdiction by the fact that they appeared before the city council and filed objections to the improvement, and afterwards protested against the report of the commissioners. If the city council failed to acquire jurisdiction of the subject-matter of the improvement, it could not acquire jurisdiction by the consent of the plaintiffs, much less by the fact that they objected to the improvement. It was said in *Hewes v. Reis*, 40 Cal. 263: "The right to appear before the board and object cannot certainly excuse the performance of those acts which are conditions precedent to the exercise of the power, nor does this right of remonstrance possess the least semblance of a remedy for a wrong that may be committed notwithstanding the protest"; and the actual appearance and protesting cannot have any greater effect, for the purpose of conferring jurisdiction, than the unexercised right of so appearing and protesting.

The judgment is affirmed.

DE HAVEN, J., and PATERSON, J., concurred.

[No. 20937. In Chambers. — August 3, 1892.]

IN THE MATTER OF DELLA GRACIE GATES, ON
HABEAS CORPUS.

PARENT AND CHILD — CUSTODY OF CHILD BY UNCLE AND AUNT — HABEAS CORPUS — RIGHT OF MOTHER — CHOICE OF CHILD. — Upon the hearing of a writ of *habeas corpus* sued out by the mother of a child to recover its custody from its uncle, who had been appointed as its guardian by the superior court, although it may appear that the order appointing the guardian was void for want of jurisdiction, yet where the mother voluntarily relinquished the care of the child when she was scarcely a year old, and ever since she was two years of age left her in the exclusive charge and control of her uncle and aunt, the mother seeing the child but twice in nearly nine years, and the child's material interests will be promoted by leaving her with the uncle and aunt, with whom the child herself chooses to remain, no coercive order will be made by the court by which the mere legal right of the mother to the custody of the child may be enforced against the child's manifest inclination and reasonable choice to remain with her uncle and aunt, but the child will be left free to go to the home of her choice.

APPLICATION to the Supreme Court to secure the custody of a child upon a writ of *habeas corpus*. The facts are stated in the opinion of the Chief Justice.

F. M. Brandon, for Petitioner.

Clay W. Taylor, contra.

BEATTY, C. J.—The petitioner, Margaret J. Olson, a resident of Santa Clara County, is the mother of Della Gracie Gates, aged ten years and five months, who, the petitioner alleges, is unlawfully restrained of her liberty by James Eldridge, at his residence in Lassen County. Said Eldridge admits that he has the custody of the child, and claims that he has a right thereto by virtue of an order of the superior court of Shasta County, appointing him her guardian.

From the facts disclosed by the petition, the return, and the evidence adduced at the hearing, I am satisfied that the order appointing Mr. Eldridge guardian of the child is void for want of jurisdiction, and that the petitioner is the person legally entitled to her custody. But in view of the special circumstances of the case, I do

not feel called upon to make any coercive order by which the mere legal right of the petitioner may be enforced against the child's manifest inclination and reasonable choice to remain where she is. The petitioner voluntarily relinquished the care of her child when she was scarcely a year old, and ever since she was two years of age has left her in the exclusive charge and control of Mr. and Mrs. Eldridge, the latter being a sister of the child's father. The natural and inevitable consequence has been that this little girl, knowing no other parents or protectors, and never seeing her mother but twice in nearly nine years, has become deeply attached to her aunt and uncle, as they have to her, and has come to look upon her mother as a stranger. Though she has not reached the years of legal discretion, she is sufficiently intelligent to be trusted in some degree to choose in a matter affecting so deeply her feelings and her interests; and having examined her privately, I am convinced that it would be nothing less than an act of extreme cruelty to tear her from the only home she has ever known, even for the purpose of placing her under the care of her own mother. Her material interests also will be promoted by leaving her where she is, and where she chooses to remain. Her mother is without means to support her, except as they may be provided by her present husband, who, however willing he may be, is under no legal obligation to support a step-child, and has but small ability to do so. Mr. and Mrs. Eldridge, on the contrary, have ample means, and have no children of their own. They live in a healthy locality in the country, where all the surroundings are favorable to the moral and physical well-being of the child, and they have the disposition and ability to provide for her nurture, education, and future comfort and security.

Under these circumstances, I consider that my duty in the premises is fulfilled by seeing that the child is freed from all illegal restraint, and leaving her free to go to the home of her choice.

Writ discharged.

[No. 14628. Department One. — August 3, 1892.]

LEVI SMITH, RESPONDENT, v. THE CITY OF
SAN LUIS OBISPO, APPELLANT.

DEDICATION OF HIGHWAY — MANIFESTATION OF INTENT. — To constitute a dedication of land to public use as a highway, no particular formality of either word or act is required. It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate, or an acquiescence in the use of his land for a highway, or his declared assent to such use. The vital principle of the dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made.

ID. — BUILDING FENCES — PUBLIC USE — DECLARATIONS OF INTENTION. —

The act of a land-owner in building a fence on each side of a strip of land, leaving it open at each end to the access of the public, the strip having been used for fifteen years prior thereto without objection, and traveled over by a large number of persons, the act of building such fence being both preceded and followed by expressed statements of the land-owner showing his intention to dedicate the land as a public street, shows such a dedication.

ID. — PAYMENT OF TAXES — REBUTTAL OF INTENTION. — Where the intention of a land-owner to dedicate part of the land for street purposes has been shown by specific acts, and it does not appear but that the entire tract, including the street, has been assessed as a whole, the payment of the tax thereon by the owner cannot be held to rebut his intention of dedication so shown by his specific acts.

ID. — ASSESSMENT OF TAXES — ESTOPPEL OF PUBLIC. — The general public are not estopped from claiming that land has been dedicated as a public street by the act or omission of the city assessor in assessing the land to the dedicator and his successors in interest.

ID. — PUBLIC USE WITHOUT ACTION OF MUNICIPAL AUTHORITIES. — The use of land as a street by the public, for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient to perfect the dedication, without any specific action by the municipal authorities, either by resolution or by repairs or improvements.

ID. — COMMON-LAW DEDICATION — ESTOPPEL OF DEDICATOR — RIGHTS OF PUBLIC. — A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of a city.

ID. — EVIDENCE OF DEDICATION. — The evidence in this case reviewed and held to show an act of dedication of land to public use for street purposes.

APPEAL from a judgment of the Superior Court of San Luis Obispo County.

The facts are stated in the opinion.

William Shipsey, for Appellant.

Wilcoxon & Bouldin, for Respondent.

HAYNES, C.—Ejectment to recover a parcel of land in the city of San Luis Obispo, alleging an ouster on November 13, 1890. The answer denied all the allegations of the complaint except that defendant was a municipal corporation, and alleged that the demanded premises “is, and for many years last past has been, a public street of said city, to the possession of which the defendant is entitled for street purposes.”

The plaintiff had judgment, and defendant appeals upon the judgment roll.

The demanded premises is a strip of land about 45 feet wide and 175 feet long, and which would be wholly occupied or covered by Beach Street, in the city of San Luis Obispo, if that street were extended from a point claimed by plaintiff to be its present northwesterly terminus to Marsh Street.

A diagram, made part of the findings, but which it is not necessary to reproduce in this opinion, shows the course of Marsh Street to be northeasterly and southwesterly. Pacific Street is easterly from and parallel to Marsh Street. Nipomo Street crosses both Marsh Street and Pacific Street nearly at right angles, and Beach Street is about five hundred feet southerly from and parallel to Nipomo Street. The land in controversy extends from Marsh Street easterly about half-way to Pacific Street, to the point claimed by the plaintiff to be the westerly terminus of Beach Street, from which point Beach Street extends easterly across and beyond Pacific Street.

The court found that in October, 1871, the United States conveyed by patent to the trustees of the town of San Luis Obispo a tract of land which included the demanded premises, and in November of the same year said trustees conveyed to one Higuera a portion of said patented tract, including the part in controversy. In January, 1884, Higuera conveyed to one St. Clair. In

March, 1884, St. Clair conveyed to Forbes, and in March, 1888, Forbes conveyed to the plaintiff.

The court further found that Beach Street, extending from the land in controversy easterly, has been a public street since the year 1870, but that from 1870 until some time in 1888, there was an obstruction on that part of Beach Street adjoining the land in controversy, consisting of a corral maintained by one Martinez; that for eight years last past the land in controversy has been fenced on both sides on the lines of Beach Street if produced to Marsh Street, but was not fenced on the line of Marsh Street, but has always been open until after Forbes conveyed to plaintiff in 1888, when plaintiff built a fence on the line of Marsh Street across Beach Street if produced, which fence was maintained by plaintiff until removed by defendant on November 13, 1890. During all the times above mentioned the land remained in the condition above described, having no other structure or improvement thereon; that for fifteen years prior to the building of said fence by the plaintiff on the line of Marsh Street, the land in controversy was traveled over by a large number of persons when the bars in said corral were down, and when not down were passed by persons on foot who desired to pass; that in June, 1875, Higuera, who had purchased a part of said patented tract on each side of and including the premises in controversy, sold and conveyed to one Pellerie a lot fronting on Marsh Street, which adjoined the land in controversy, and at the time of the sale Higuera informed the purchaser that the lot he was selling to him was a corner lot, and that the street on the easterly side of the lot was Beach Street. Nine years after selling that lot to Pellerie, viz., in 1884, and before he conveyed to St. Clair, Higuera said to one Pinho that he had intended the land in controversy for a street, but as the town authorities had not worked it, or done anything about it, he considered he had a right to sell it, and intended to sell it.

The court further found that these premises had never

been platted as a street nor marked as such upon any map, public or private; that from 1871 to the present time, except two years when it was not assessed, it was assessed to Higuera and his successors in interest, and the taxes thereon were paid by them.

Upon the foregoing facts, the trial court concluded that there had never been a dedication by the plaintiff or his predecessors in interest of this property to public use as a street, and that the defendant had not in any manner accepted any dedication thereof as a street; and the questions now to be determined are whether these findings are sustained by the record.

Dedication of land to a public use is simply setting it apart or devoting it to that use. To constitute a dedication at common law no particular formality of either word or act is required. "It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use will be sufficient; the dedication being proved in most if not all of the cases by matter *in pais*, and not by deed. The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made." (*Harding v. Jasper*, 14 Cal. 648.) This case has not only been cited and approved by this court down to the present time, but accords with the best considered cases in many other states.

We think the probative facts found by the courts clearly show an act of dedication of the land in controversy by Higuera to public use for street purposes, both preceded and followed by expressed statements showing his intention so to dedicate it. The act to which we especially refer was that of building a fence on each side of this strip of land on the side lines of Beach Street produced to Marsh Street, while leaving it open at each end, thus

giving free access to it from either direction. These fences were built eight years before the trial of the case, viz., in 1883. For fifteen years prior to that time, this parcel of land was traveled over by a large number of persons when the bars of the corral were down. This use of the land by the public does not appear to have been objected to at any time. If it had been without his consent, we may reasonably suppose that instead of marking out specifically the lines of the street he would have built an obstruction across it; but thus building the fences while it was being used as a street seems to be as clear and explicit a dedication to the public for street purposes as could well have been made. Much the larger number of cases of this character in cities and towns base the evidence of dedication upon plats showing streets, and the reference thereto in sales and conveyances of lots; but the visible marking out upon the ground of the extension of Beach Street from a point about midway between Pacific and Marsh streets by fences, especially when the ground between these fences was then and for many years had been used and travelled by a large number of persons, would seem to be more conclusive evidence of intention to dedicate the same to public use than the mere platting of unused ground.

Indeed, in the latter case, until an acceptance by the town authorities or by the public, or until by the sale of lots in accordance with the plat by which the owner has vested an interest in the street in others, it is a mere offer to dedicate the land for street purposes, which he may withdraw at his pleasure.

The obstruction maintained by Martinez, consisting of a corral, the bars of which were sometimes up and sometimes down, could not affect the dedication of the land in controversy to street purposes. It was not upon Higuera's land, nor maintained by him, but was upon a public street of the city as expressly found by the court. Even if the obstructions were permanent, and such as the public could not remove otherwise than by condemnation, it is expressly held that a *cul-de-sac* may be dedi-

cated to public use. (*Stone v. Brooks*, 35 Cal. 497, 498, and cases there cited.)

As to the fact that this strip of land had been assessed to Higuera and his successors in interest, and the taxes paid by them continuously, except two years when it was not assessed, we are of opinion does not affect the dedication. The findings do not show that this was assessed as a separate lot by a designation which would identify it, nor that the larger tract owned by Higuera, as shown by the second finding, had ever been subdivided into lots and blocks; and if the entire tract was assessed as a whole, as we may fairly infer from the findings, the failure to except this part covered by a traveled way was entirely proper, as much so as not to except a highway in the assessment of a farm. Besides, we think the general public are not estopped by the act or omission of the city assessor in this regard, nor that the payment of the tax by Higuera, under the circumstances disclosed by the findings, could be held to rebut his intention, as shown by specific acts to dedicate the land for street purposes.

In 1875, eight years before Higuera built these fences, he represented to one Pellerie, to whom he sold a lot fronting on Marsh Street, that "it was a corner lot; that that was Beach Street on the east side of the lot referred to"; thus recognizing it as an existing street at that time. In 1884 he said to one Pinho that he had intended the land in controversy for a street, but as the town authorities had not worked it or done anything about it, he considered he had a right to sell it, and intended to sell it. This statement confirms our conclusion as to the intention with which all his previous acts had been performed, and only shows his legal conclusion that he had a right to sell the land because the town authorities had not improved the street. In this conclusion we think he was wrong.

If it were necessary that the municipal authorities should accept the dedication by some formal act, or by improving the street in order to consummate or perfect

the dedication, or to render it irrevocable, then Higuera's conclusion that he had a right to sell the land was correct, and the judgment should be affirmed. Upon the question whether the acceptance must be by the municipal authorities, or whether the use of the street by the general public, under and in accordance with the dedication, is sufficient, the authorities are by no means uniform. In some states legislative enactments require a formal acceptance. In others, in the absence of any statutory requirements, the improvement of the road or street by the authorities specially charged with their care is required by the courts to establish the fact of acceptance, in the absence of more formal action. The ground upon which these statutes and decisions rests is, that the municipality ought not to be charged with the burden of improving streets which the authorities may deem unnecessary. But that does not seem to have been the policy of this state, legislative or judicial.

Prior to 1883, section 2619 of the Political Code provided that "all roads used as such for a period of more than five years are highways."

The chapter containing the above provision was repealed, and sections 2618 to 2756 of the Political Code were enacted February 28, 1883; and section 2618, as it now exists, recognizes as highways not only those laid out by the public, but those also which have been dedicated or abandoned to the public, or made such in actions for the partition of real property. It will be noticed, too, that this section expressly includes streets, alleys, lanes, courts, places, etc., in the term "highways." "A highway is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair." (*Peck v. Smith*, 1 Conn. 103, 132; 6 Am. Dec. 216.) It might with some force be contended that the use of the ground in controversy for the period of more than five years prior to the repeal of section 2619 of the Political Code,

in the manner stated in the findings, made it a statutory highway. (See *Bolger v. Foss*, 65 Cal. 250.)

Independently of the statute, however, we think the use of the street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of the city; for a street is a highway for the use and benefit of the public at large, though under the immediate care of the municipality.

In *New Orleans v. United States*, 10 Pet. 662, it was held that in order to dedicate property for public use in cities and towns and other places, it is not essential that the right to use the same shall be vested in a corporate body. It may exist in the public, and have no other limitation than the wants of the community at large.

This case was cited and approved by this court upon this point in *School District v. Heath*, 56 Cal. 480, where *Bryant v. McCandless*, 7 Ohio, 476, was also cited to the point "that dedications of land for public or charitable uses are good without a donee to take title."

These cases were not those involving the acceptance of streets or highways, but the principle involved is the same. Indeed, it is difficult to conceive how the general public could, without legislative intervention, accept a dedication to their use otherwise than by user for the purpose for which the dedication was made.

In *Harding v. Jasper*, 14 Cal. 647, it was said: "If the soil be accepted and used by the public in the manner intended by the owner, the dedication is complete"; and this quotation is cited in *San Francisco v. Calderwood*, 31 Cal. 589, 91 Am. Dec. 542, in such connection as to show that the acceptance by the public was that shown by mere user.

In *San Francisco v. Canavan*, 42 Cal. 553, this court

said: "To constitute a valid and complete dedication, two things must occur, to wit, an intention by the owner clearly indicated by his words or acts to dedicate the land to public use, and an acceptance by the public of the dedication. This acceptance is generally established by the use by the public of the land for the purpose to which it had been dedicated." In *Stone v. Brooks*, 35 Cal. 497, it was said: "There does not seem to be any necessity for a formal acceptance by some particular board of officers. Such a requirement would destroy the common-law doctrine of dedication." In several cases where the distinction between a formal acceptance and an acceptance by user was not important to be observed, general language is used, which might seem to imply that a formal acceptance was necessary, but we do not recall any case where the doctrine that user alone by the public is sufficient acceptance is denied.

We therefore advise that the judgment of the superior court be reversed.

BELCHER, C., and VANOLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed.

HARRISON, J., PATERSON, J., GAROUTTE, J.

[No. 19011. Department Two. — August 2, 1892.]

THE PEOPLE EX REL. RICHARD E. ATKINSON,
RESPONDENT, v. J. T. JOHNSON, COUNTY AUDITOR
OF SANTA BARBARA COUNTY, APPELLANT.

JUDGMENT UPON PLEADINGS — ADMISSION OF ALLEGATIONS OF ANSWER. —
An allegation of an answer upon a material issue raised by the pleadings is admitted by a motion of the plaintiff for judgment upon the pleadings.

CONSTITUTIONAL LAW. — COMPENSATION OF CONSTABLES — DIMINUTION DURING TERM. — An ordinance of the board of supervisors diminishing the compensation of constables for services in criminal cases during the term is not in conflict with section 9 of article XI. of the constitution,

which prohibits an increase of salary of an officer after his election or during his term of office.

1D. — COUNTY GOVERNMENT ACT — SALARIES OF CONSTABLES — COMPENSATION NOT PROPORTIONED TO DUTIES. — Subdivision 14 of section 183 of the act of March 13, 1891 (Stats. 1891, p. 377), entitled "An act to establish a uniform system of county and township governments," which attempts to delegate the power to fix the salaries of constables of counties of the twenty-first class to the board of supervisors, is in conflict with section 5 of article XI. of the constitution, which imposes upon the legislature the duty of regulating the compensation of such officers in proportion to duties, and is therefore void.

1D. — MANDATORY PROVISION OF CONSTITUTION — DELEGATION OF LEGISLATIVE POWER. — Section 5 of article XI. of the constitution, providing for the regulation by the legislature of the compensation of officers therein named in proportion to their duties, is mandatory, and the duty of such regulation cannot be delegated to the board of supervisors.

APPEAL from a judgment of the Superior Court of Santa Barbara County.

The facts are stated in the opinion of the court.

A. E. Putnam, and *Richards & Carrier*, for Appellant.

Attorney-General W. H. H. Hart, and *J. W. Taggart*, for Respondent.

THE COURT. — The question involved in this case is the validity of an ordinance of the board of supervisors of Santa Barbara County, made April 10, 1891, fixing the salaries of the constables of the various townships of the county for their services in criminal cases. In each of the townships 1, 3, and 8, the annual salary for such services was fixed at \$24, in No. 2 at \$480, and in each of the remaining townships specific sums, varying in amounts. This order was made pursuant to subdivision 14 of section 183 of "an act to establish a uniform system of county and township governments," approved March 13, 1891 (Laws 1891, p. 377), which subdivision reads as follows: "14. Constables, a salary to be fixed by the board of supervisors, and paid monthly out of the salary fund, as the salaries of the county officers are paid, such salary to be in full compensation for all services of any kind, nature, or description required of them by law in

criminal cases; and said constables shall be allowed to charge and receive for their own use such fees as are now or may hereafter be allowed by law for all services performed by them in civil cases. The provisions of this subdivision shall take effect from and after the approval of this act." Section 183, of which the foregoing subdivision is a part, relates only to counties of the twenty-first class, to which class the county of Santa Barbara belongs. Alonzo Crabb and C. H. Kelton were duly elected constables of township No. 2, in said county, for the term of two years, beginning on the fifth day of January, 1891, three months and five days before the date of the order. Prior to the commencement of the action, the defendant was county auditor, had drawn several warrants to each of said constables for monthly installments of forty dollars each, and this suit was brought to enjoin the further issuance of warrants under said order.

The complaint, in addition to the foregoing facts, alleged that the compensation for services rendered by constable in criminal cases in said county was fixed by section 23 of an act entitled "An act to regulate fees of office and salaries of certain officers, and to repeal certain other acts in relation thereto," approved March 5, 1870; that the fees to which said constables were legally entitled were less than the said sum of forty dollars per month; that the board of supervisors had no authority of law to make said order; and that it was in violation of sections 5 and 9 of article XI. of the constitution of the state of California, and therefore null and void.

The defendant interposed a general demurrer to the complaint, which was properly overruled, and thereupon filed an answer admitting the making of said order by the board of supervisors, averring that they had authority to make it, that said constables were entitled to the compensation thereby fixed, and further alleging that said compensation was less than that they had theretofore received, or would have been entitled to receive under the act of 1870. Plaintiff moved for judg-

ment on the pleadings, which was granted, and defendant appeals.

There is no question that the order of the board of supervisors conformed to subdivision 14 of section 183 of the said act of 1891, and therefore the sole question is as to the constitutionality of that subdivision of said section.

The answer having raised an issue as to whether the compensation of these officers was increased or diminished by the order, the answer alleging affirmatively that it was less, plaintiff's motion for judgment on the pleadings admitted this averment of the answer. (*Fleming v. Wells*, 65 Cal. 339; *Ward v. Flood*, 48 Cal. 46; 17 Am. Rep. 405; *Taylor v. Palmer*, 81 Cal. 257.) It follows, therefore, that the order in question cannot be held violative of section 9 of article XI. of the constitution, which prohibits an increase of salary of an officer after his election or during his term of office.

Said subdivision 14 of section 183 of said act, upon the constitutionality of which the validity of said order depends, is, however, clearly obnoxious to section 5 of article XI. of the constitution, as alleged in the complaint. This section of the constitution is as follows: "The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population."

In the recent case of *Dougherty v. Austin*, 94 Cal. 601, in which the opinion upon rehearing was filed May 30, 1892, this provision was carefully considered and very fully discussed. In that case the question arose upon an order made by the board of supervisors of Marin County, providing for the appointment of a deputy county clerk, at a salary of fifty dollars

per month, payable out of the county treasury, which order was made under section 211 of the County Government Act as amended in 1887. (Stats. 1887, p. 207.)

That case, it is true, also involved the consideration of section 9 of article XI., which, as we have seen, does not arise in this case; but in all other respects the questions in that case and in this are the same. In *Dougherty v. Austin*, it was held that section 5 of article XI., above quoted, imposed upon the legislature the duty of regulating the compensation of the officers there named or designated in proportion to duties; that this provision was mandatory, and could not be delegated to the board of supervisors; and under the authority of that case, subdivision 14 of said section 183 must be held to be in conflict with section 5 of article XI. of the constitution, and therefore void.

Judgment affirmed.

McFARLAND, J., did not take part in the decision.

[No. 14598. Department Two. — August 3, 1892.]

HENRY E. CARTER, RESPONDENT, v. E. J. BALDWIN, APPELLANT.

ATTORNEY AND CLIENT — SPECIAL CONTRACT FOR SERVICES OF ASSISTANT COUNSEL — SERVICE NOT REQUESTED — WAIVER OF PERFORMANCE. — Where a firm of attorneys was employed to assist in the prosecution of certain libel suits pending and to be brought against a private individual, and also a civil suit against a newspaper for libelous articles, under a contract that part of the fee was to be paid in cash, a part in sixty days, and the balance "on the termination of said suits," and it appears that all the services were performed except the contemplated suit against the newspaper, and the evidence in an action upon the contract tends to show that the defendant never went near the members of the firm after employing them, nor in any manner thereafter requested them to bring the action against the newspaper, nor did the other attorneys whom they were employed to assist ever call upon them for any service in relation to such suit, it was not incumbent upon such firm to commence the action against the newspaper without

further directions from the defendant or from the other attorneys, and having waited a reasonable length of time, and until after the action against the newspaper was barred by limitation, without receiving such directions, they were justified in assuming that the defendant had waived the bringing of the action, and they are entitled to recover the balance due under the contract, as if such service had been actually performed.

1D. — PLEADING — ALLEGATION OF FULL PERFORMANCE — PROOF OF WAIVER — IMMATERIAL VARIANCE. — Where the complaint in such case alleged the full performance of the contract on the part of the attorneys, and the evidence upon the part of the plaintiff tended to show performance by them of all the services contemplated by the contract, except in relation to the suit against the newspaper, but as to that a waiver of performance by the defendant, and the evidence was received without objection, and the defendant is not shown to have been misled by the variance, it is to be disregarded as immaterial.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Wells, Monroe & Lee, for Appellant.

Anderson & Anderson, for Respondent.

DE HAVEN, J. — This action is brought by plaintiff as assignee of a contract made by defendant with the law firm of Silent, Wade & Fitzgerald. The complaint was filed on April 14, 1890, and alleges, in substance, that defendant, on February 10, 1886, employed said firm of Silent, Wade & Fitzgerald to prosecute certain libel suits then pending and to be brought against one Bell, and also a civil suit against the Los Angeles Times for libelous articles therefore published, the defendant agreeing to pay for such services two thousand dollars, of which sum five hundred dollars was to be paid in cash, five hundred dollars in sixty days from date of the agreement, "and the balance of one thousand dollars on the termination of said suits." The complaint further alleges that the assignors of plaintiff fully performed said contract, and that all of the suits referred to in the agreement have been termi-

nated, and that defendant has not paid the balance of one thousand dollars agreed to be paid on the termination thereof, and this action is brought to recover such balance.

The answer of defendant denied that plaintiff's assignors had performed the services required of them under the contract stated in the complaint, and in this connection alleged that the suit against the Los Angeles Times was never commenced, and that no services had been rendered therein, as contemplated by said contract.

The action was tried by the court without a jury, and findings were filed, and a judgment rendered in accordance therewith in favor of the plaintiff for the full amount claimed by him. The defendant appeals.

It is conceded that the contemplated suit against the Los Angeles Times was never commenced, and the claim of appellant is, that this being so the plaintiff is not entitled to recover. We think, however, that the evidence tended to show a waiver of performance of this particular service, and the findings of the court fairly construed are to this effect. The evidence upon the part of the plaintiff tended to show that the firm of Silent, Wade & Fitzgerald were employed to assist other attorneys of defendant in the prosecution of the suits referred to in the complaint. The attorneys thus to be assisted were the regular attorneys for defendant, and had commenced the civil suits which were then pending, and according to the testimony for plaintiff, were to continue as senior counsel not only in these, but were to act as such in the one to be brought against the Los Angeles Times. The defendant never went near the firm of Silent, Wade & Fitzgerald after employing them, nor in any manner thereafter requested them to bring the action against the Los Angeles Times, nor did the other attorneys, whom they were employed to assist in the matter ever call upon them for any service in relation to such suit. When this action was commenced, the period of limitation fixed by the laws of this state within which to commence the action against the Los Angeles Times for the

alleged libel had expired. It is true, the defendant in such an action might waive this defense; but still such long delay upon the part of this defendant in the matter of directing the commencement of such suit is strong evidence that he had abandoned all intention of bringing it. It is undoubtedly true that in many cases the contract employing an attorney to prosecute an action would be construed as containing an implied, if not express, direction to the attorney to bring such action without further request upon the part of the client, but under the contract which the evidence of plaintiff tended to establish in this case, it was not incumbent upon the assignors of plaintiff to commence the action against the Los Angeles Times without further directions from defendant, or from the other attorneys who were to act as senior or leading counsel for defendant in the prosecution of the case; and having waited a reasonable length of time without receiving such directions, they were justified in assuming that defendant had waived the performance of this particular service, and they were entitled to recover upon the contract, as if such service had been actually performed.

The complaint in this case alleges full performance of the contract upon the part of Silent, Wade & Fitzgerald, where as the evidence upon the part of plaintiff tended to show performance by them of all services contemplated by the contract, except in relation to the suit against the Los Angeles Times, and as to that a waiver of performance by defendant. We do not regard the variance as material. The evidence was received without objection, and it is apparent from the record that the defendant was not misled thereby. This being so, the variance is to be disregarded under section 469 of the Code of Civil Procedure, which declares: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

The evidence upon the trial was conflicting upon ma-

terial points, but the case seems to have been fully and fairly tried, and we find no error in the record.

Judgment and order affirmed.

McFARLAND, J., and SHARPSTEIN, J., concurred.

[No. 19017. In Bank. — August 4, 1892.]

**FRANK E. BATES, APPELLANT, v. E. S. BABCOCK
ET AL., RESPONDENTS.**

APPEAL — REVIEW OF DEMURRER — ERRORS AGAINST RESPONDENT. —

Where a demurrer of a defendant is overruled for want of presentation, upon an appeal by the plaintiff from a judgment of the defendant, the respondent cannot urge any grounds of special demurrer, or any errors committed against him, for the purpose of sustaining a judgment erroneously rendered in his favor after a trial upon the merits; but the appellate court can only consider such errors of the court as contributed to the rendition of the judgment for the defendant, and can consider the demurrer only so far as it goes generally to the cause of action, and affects the question whether the complaint is sufficient to render the exclusion of evidence under it erroneous.

PLEADING — UNCERTAINTY — CONSTRUCTION. — The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint.

IN. — ALLEGATION AS TO PARTNERSHIP IN LANDS — DIVISION OF PROFITS — OWNERSHIP OF LAND. — An allegation that defendants agreed upon certain terms to become equal partners with the plaintiff in certain real property, which the complaint elsewhere shows was held by plaintiff upon a dry, naked trust for third parties, and was purchased from the beneficiaries and transferred to another person as trustee for plaintiff and defendants, does not necessarily imply an agreement for a conveyance of the property to the defendants; and taken in connection with the other averments of the complaint, and with an averment immediately following, that they were to share equally all sums received for the property, and all profits and losses accruing on account thereof, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land.

PARTNERSHIP — DEALING IN LANDS — STATUTE OF FRAUDS — ORAL AGREEMENT — EVIDENCE. — A partnership may be formed for the purpose of dealing in lands, by buying and selling lands generally, or it may be limited to a speculation upon a single venture; and like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions, and does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate

- in lands, other than a pecuniary interest, and need not be in writing under the statute of frauds, but may be formed by oral agreement and proved by parol evidence.
- ID. — ACQUISITION OF LANDS BY PARTNERSHIP — EQUITABLE RIGHTS OF PARTNERS. —** Though such partnership agreement does not of itself create any interest or estate in land, and a bill for the conveyance of lands could not be maintained thereunder, yet by the subsequent acts of the parties, rights are acquired in reference to land purchased in pursuance of the agreement which a court of equity will protect against any attempts to make the statute of frauds an instrument of fraud, by raising an equity superior to the legal title, and controlling the legal title in subordination thereto.
- ID. — INTEREST IN LANDS — TRUST RESULTING BY OPERATION OF LAW — PAROL EVIDENCE OF PARTNERSHIP. —** If a partnership is proved between the parties upon sufficient evidence, they would have an interest in the lands acquired which forms a portion of the assets of the partnership by reason of a trust resulting by operation of law as an incident to such partnership, but that fact would not constitute a reason for excluding parol evidence to establish the existence of the partnership.
- ID. — PARTNERSHIP ASSETS — LANDS TREATED AS PERSONALTY. —** Lands acquired by a partnership for partnership uses constitute partnership assets, and will be treated in equity as personalty, whether the partnership was formed by oral or written agreement; and the same principle applies when the object of the partnership is to deal in lands which are purchased with partnership assets.
- ID. — SETTLEMENT OF PARTNERSHIP — CONVERSION OF ASSETS INTO MONEY — SOURCE OF TITLE. —** A court of equity, in the settlement of partnership accounts and the conversion into money of partnership assets, whether real or personal, and their division among the partners, never inquires into the source of title of such assets, or in whose name they are held.
- ID. — DIVISION OF PROCEEDS OF SALE OF LANDS — STATUTE OF FRAUDS NO DEFENSE. —** In an action for division of the proceeds after a sale of lands under an oral partnership agreement to deal in lands, the statute of frauds is not allowed as a defense thereto; and the same principles which apply to such an action are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale and distribution of proceeds among the partners by a court of equity.
- STATUTE OF FRAUDS — EXECUTED AGREEMENT. —** The statute of frauds has no application to an executed agreement.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Sprigg & Barber, for Appellant.

Works, Gibson & Titus, and *Works & Works*, for Respondent.

HARRISON, J.—The plaintiff brought this action against the defendants for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate in San Diego. At the trial of the action, the plaintiff offered himself as a witness, and under the objection of the defendants that it was incompetent and immaterial, gave testimony tending to show that an oral agreement had been made between himself and the defendant Babcock, acting on behalf of the defendant the Coronado Beach Company, of which he was president, by which they were to pay off the encumbrances upon certain real estate, sell and dispose of the same, and share the profits and loss in dealing therein; that for that purpose he gave to the defendants fifteen thousand dollars with which to pay certain claims and encumbrances thereon, and that the same was so applied; and that at the request of the defendant Babcock, a conveyance of the property was executed to one Hubbell, who was the secretary of the defendant corporation. After this testimony had been given, the defendants moved to strike out all portions thereof "relating to an agreement for an alleged partnership between the plaintiff and the defendants, or either to them, in the land described in the complaint, or any partnership between the parties, upon the ground that the same is incompetent and immaterial; that a partnership of the character alleged in the complaint must be proved by an instrument in writing, signed by them, or one of them." The court granted the motion, saying that "the contract, as alleged in the complaint, and supported by the evidence, is one clearly for an interest in lands, and as such is void under the statute of frauds." Upon the submission of the cause, the court, in its decision, found that there had been no agreement for a partnership in the land, and rendered judgment in favor of the defendants. From this judgment, and an order denying his motion for a new trial, the plaintiff has appealed.

We cannot, upon this appeal, consider the objections

to the complaint that were made by the demurrer thereto, except the one specifying that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled for "want of presentation," and the defendants, having gone to trial upon their answer, obtained a judgment in their favor upon the merits. Upon an appeal by the plaintiff from that judgment, we can consider only such errors of the court as are shown to have contributed to its rendition, and not such as might have defeated a contrary judgment. If a judgment in favor of the defendant is the result of errors in excluding evidence that should have been received, he, as respondent upon an appeal, cannot, for the purpose of sustaining that judgment, have a consideration of errors against him which were entirely disconnected with the trial, or the judgment as rendered. Objections to a complaint which should be pointed out by special demurrer, such as uncertainty, or ambiguity, are insufficient, unless so specified, to defeat a verdict against the defendant; nor can they, if specified and overruled, be considered for the purpose of sustaining a judgment in his favor that was erroneously rendered after a trial upon the merits. It is only when there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that fact could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof, and if sufficient to sustain the averments, to render a judgment as asked by the plaintiff.

The character and effect of an averment that may be uncertain in one of its clauses is not limited to a con-

struction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. The averment that the defendants agreed with the plaintiff that if he would pay certain claims against the property "they would become equal partners with him in the said property" does not necessarily imply an agreement for a conveyance from him to them, and taken in connection with the averment immediately following, viz., "and would share equally with him, in the proportion of one half to plaintiff and one half to defendants, all sums received for said property, and all profits and losses accruing on account thereof," which is evidently inserted by way of explanation, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land.

It appears from the complaint that at the time of this agreement the property in question was owned by one Miller and his wife, and that the defendant corporation held certain mortgages thereon, which were subordinate to certain other liens, and that the title to the property stood in the name of the plaintiff, and was held by him "as trustee for the benefit of said Miller and wife." It does not appear that the plaintiff had any beneficiary interest in the land, and the averment that five thousand dollars of the money advanced by him under the agreement was paid to the Millers "for a release from the said trust in their favor" confirms the inference that it was merely a dry, naked trust. The subsequent averment that "in pursuance of said agreement," then made, the plaintiff paid to the defendants fifteen thousand dollars with which to remove certain charges and encumbrances, and that "all of said property was duly transferred by plaintiff to O. S. Hubbell, Esq., secretary of said Coronado Beach Company, as trustee for the parties hereto, to facilitate a sale," and that with the concurrence of the defendants the plaintiff paid liens and debts on account of said property amounting to

forty-two thousand dollars, removes all possibility of construction that the agreement was for a sale of the property to the defendants, or for the creation of an interest or estate therein, and shows that the parties dealt with the property as assets of their said partnership.

A partnership may be formed for the purpose of dealing in lands, as well as for dealing in personal estate, or for engaging in professional, or commercial, or manufacturing occupations. Like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions. Such a partnership may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture. (*Dudley v. Littlefield*, 21 Me. 422; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Williams v. Gillies*, 75 N. Y. 201.)

Whether such a partnership can be formed, except by an agreement in writing, has been the subject of conflicting decisions. There is a *dictum* in *Gray v. Palmer*, 9 Cal. 639, to the effect that it must be in writing, for which Story on Partnership, section 83, is cited as authority; and in *Smith v. Burnham*, 3 Sum. 458, it was so held by that distinguished jurist. The great weight of modern authority, however, is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence. It was so stated in *Coward v. Clanton*, 79 Cal. 23, where it was held that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels, and for a division of the profits resulting therefrom, in which one party was to furnish the capital and take a conveyance of the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing. More than a hundred years ago it was held by Lord Thurlow, in *Elliot v. Brown*, reported in 3 Swanst. 489, 1 Vern. 217, that the right of survivorship in a joint demise of a farm was destroyed by reason of the tenants

having farmed the land upon joint account, and thus by their acts made it partnership assets. The question was very fully considered by Vice-Chancellor Wigram in *Dale v. Hamilton*, 4 Hare, 369, wherein previous decisions involving similar principles were reviewed, and it was held that under the principles of those decisions the existence of such a partnership could be shown by general evidence, without the necessity of a written agreement. In that case a parol agreement had been entered into, under which a tract of land was to be purchased in the name of one McAdam, and laid out in lots, and re-sold, he furnishing the capital and the plaintiff the skill and labor necessary therefor, and the profits resulting from the venture were to be divided between them. The purchase was accordingly effected in the name of McAdams, but the defendants who had succeeded to McAdam, with notice of the agreement, afterwards refused to carry it out. Thereupon the plaintiff filed his bill for an accounting and a sale of the land under the direction of the court, with a division of the proceeds in accordance with the terms of the agreement. The defendants resisted the suit, upon the ground that the agreement was within the statute of frauds, and could be established only by an instrument in writing; but the vice-chancellor overruled their objections and upheld the bill. In his opinion (p. 383) he used the following illustration in support of his conclusion, which is peculiarly appropriate to the present case: "In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value, that a loss had been sustained, and that Hamilton and McAdam were the plaintiffs seeking to compel Dale to contribute his proportion to the loss. If in this case the authorities would have enabled Hamilton and McAdam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects, to have compelled contribution from Dale, the same authorities will, upon like proof, support the present suit upon the

principle—that of mutuality in remedies—which enables a vendor to recover the purchase-money in this court, though the remedy at law may be equally adequate and more appropriate,” and cites several authorities to the effect that in such a case the defendant would have been liable for contribution. The rule laid down in *Dale v. Hamilton*, 5 Hare, 369, has since been generally followed, and although there are some decisions to the contrary, may now be said to be the prevailing rule upon that subject.

Irrespective of any decision, however, an agreement of this character cannot be said to contravene the provisions of the statute of frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense, the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement,—that sense in which the beneficiary, under a trust for the sale of real estate, and payment to to him of the proceeds of the sale, had an interest in the land; but it is only a pecuniary interest resulting from the sale and a right to have the land sold, rather than an interest in the land itself. The statute of frauds does not prevent parol proof for the purpose of showing an interest in lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud. A bill for the conveyance of the lands could not be maintained under such an agreement, but by reason of the acts of the parties thereunder an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity.

It is a familiar rule in equity, that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships.

The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. The question has frequently arisen in actions for the division of the proceeds after a sale under such an agreement, and it has been invariably held that the statute of frauds is no defense thereto. (*Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592; *Benjamin v. Zell*, 100 Pa. 33; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Babcock v. Read*, 99 N. Y. 609; *Coward v. Clanton*, 79 Cal. 23; *Reed on Statute of Frauds*, sec. 727. See also *Byers v. Locke*, 93 Cal. 493.) Under such an agreement, it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas, if the agreement was invalid at the outset, it could not form the basis of such an action. If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its enforcement for the purpose of carrying out its original purpose,—the division of the profits resulting from the

speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners. This was the case presented and maintained in *Dale v. Hamilton*, 5 Hare, 369. The same procedure was upheld in *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Bunnell v. Taintor*, 4 Conn. 568; *Hunter v. Whitehead*, 42 Mo. 524; *Bissell v. Harrington*, 18 Hun, 81; *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735; *Coward v. Clanton*, 79 Cal. 23. After the agreement for the purchase and sale has been executed by making the conveyance in accordance with such agreement, it cannot be objected that such conveyance could not have been compelled on account of the statute of frauds. (*Pico v. Cuyas*, 47 Cal. 174.) The statute of frauds has no application to an executed agreement.

That the agreement between the parties, which is averred in the complaint, and the evidence given in support thereof, did not contemplate any transfer of the land, or of any interest therein, to the defendants, or either of them, but had for its object only a division of the profits and loss that would remain after its sale, is shown by a consideration of the averments of the complaint hereinbefore presented, and also by the direction of Babcock to the plaintiff while negotiating the agreement to "sell it off as soon as you can, pay up the debts, and divide the profits." It was not necessary for the plaintiff, in support of these averments, to produce written evidence of the agreement, but the agreement could have been established by his oral testimony; and the court erred in striking out the testimony that he gave in support of the agreement. The first question to be determined by the court was, whether there was a partnership, and that fact could be shown by general evidence. In *Forster v. Hale*, 5 Ves. 309, where the right to an interest in the leasehold of a colliery, claimed by virtue of a partnership with one of the lessees, was involved, and it was

objected that by permitting parol evidence to establish such interest, an interest in real estate or a declaration of trust would be gained without any writing, in violation of the statute of frauds, Lord Loughborough said: "That is not the question: it is whether there was a partnership; the subject being an agreement for land, the question is, whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." Under the same principles, if in the present case the court should find, upon sufficient evidence, that a partnership existed between the parties, the fact that they would have an interest in the land which forms a portion of the assets of the partnership would result by operation of law as an incident to such partnership, but this result would not constitute a reason for excluding parol testimony to establish the existence of the partnership.

For the error of the court in striking out the evidence of the plaintiff, the order and judgment are reversed, and the court is directed to grant a new trial.

PATERSON, J., SHARPSTEIN, J., DE HAVEN, J., GAROUTTE, J., and McFARLAND, J., concurred.

BEATTY, C. J., dissenting.—I dissent. The complaint, in my opinion, shows no cause of action, and the evidence offered and stricken out by the court was of a parol contract, invalid under the statute of frauds.

[No. 14701. Department One. — August 5, 1892.]

ALHAMBRA ADDITION WATER COMPANY, APPELLANT, v. SOLOMON RICHARDSON ET AL., RESPONDENTS.

WATER RIGHT — CONSTANT FLOW — CONSTRUCTION OF JUDGMENT. — A judgment in an action to determine and define a water right, adjudging that the defendants are the owners of a quantity of the waters in question "equal to a constant flow of two and one third inches, measured under a four-inch pressure, on their said premises, and are entitled to the use of the pipes, ditches, aqueducts, and reservoirs belonging to plaintiff," for the purpose of storing, preserving, and conducting the same upon their lands, does not entitle the defendants to put into the pipe an appliance by means of which they can at *one time* accumulate a head of water greater than a constant flow of two and one third inches under a four-inch pressure, and average the flow so as to equal the amount of such constant flow, but requires them not to obstruct the flow to any greater extent at any time than the constant flow provided for by the judgment.

ID. — RIGHTS ACQUIRED BY STIPULATION — FINDING. — If by the terms of a stipulation, entered into after the commencement of the former action, the defendants acquired any rights in the waters flowing their lands in the pipes of the plaintiff, other or different from those specified in the judgment, they are entitled to be protected therein in a subsequent action involving the water right; but it is necessary that the court in such subsequent action should find whether the stipulation was made before or after the commencement of the former action, and what were its terms.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial.

The facts are stated in the opinion.

John S. Chapman, and Smith, Howard & Smith, for Appellant.

Wells, Monroe & Lee, for Respondents.

FOOTE, C.—This action was brought to prevent the defendants from maintaining a certain water-gate in a pipe conveying water for irrigation and other purposes, belonging to the plaintiff; and to prevent the defendants from taking from that pipe a greater quantity of water than what the plaintiff claimed the defendants had a legal right to use.

The court below refused to grant the relief by injunction asked for by the plaintiff, and rendered judgment in favor of the defendants. The plaintiff moved for a new trial, which was refused, and the appeal is from the order denying its motion.

It appears by a decision of the supreme court, in a case where these same parties were litigants (72 Cal. 598), that the water right of the defendants, as against the plaintiff, was determined and defined; and it is claimed by the appellant that the court below took an erroneous view of the scope of the judgment rendered therein, and by its decision in this case allowed to the defendants certain rights in taking water from the plaintiff's water-pipe which were entirely inadmissible under the view of the matter taken by the appellate court in affirming the judgment on the former appeal.

The former judgment above alluded to defined the respective rights of the plaintiff and defendants thus:—

"It is ordered, adjudged, and decreed that the Alhambra Addition Water Company, plaintiff, is the owner of all the water and water rights being, arising, or flowing in or from that certain cañon in the County of Los Angeles, state of California, known as the Keweenaw Mill of Lake Vineyard Cañon, and of the dams, ditches, reservoirs, and pipes used by plaintiff for the purpose of diverting said waters from said cañon; and also the large iron pipe connecting with the waters of said cañon, and extending down through lands of defendants, as described and alleged in the complaint filed herein; except an amount equal to a constant flow of two and one third ($2\frac{1}{3}$) inches of water flowing from said cañon, measured under a four (4) inch pressure, on the premises of defendants hereinafter described, which said quantity of water so excepted from plaintiff's ownership is hereby adjudged to belong to defendants for irrigation, household, and domestic purposes, as appurtenant to and for use upon the following described lands, to wit [Here follows description of lands.]

"Excepting, also, that the defendants own and are entitled to the use of the pipes, ditches, aqueducts, and re-

servoirs belonging to plaintiff, as hereinafter adjudged, for the purpose of conducting, storing, and preserving the waters hereinbefore adjudged to belong to defendants, to and upon their premises as aforesaid; and it is adjudged that said defendants have the right to take said water from the pipe as now constructed at any point upon their said land for the purpose and in the quantity aforesaid.

"And it is further ordered, adjudged, and decreed that the defendants aforesaid are the owners of that certain portion and quantity of the waters described in the complaint *equal to a constant flow of two and one third (2 $\frac{1}{3}$) inches, measured under a four (4) inch pressure, on their said premises, and are entitled to the use of the pipes, ditches aqueducts, and reservoirs belonging to plaintiff*, and described in the complaint, for the purpose of storing, preserving, and conducting the same upon their lands hereinbefore described for the purposes aforesaid; and that said defendants have the right to take the quantity of water aforesaid from the pipe as now constructed at any point upon said lands above particularly described."

The court below evidently took the view, which we cannot uphold, that the defendants were entitled under this decree to put into the pipe an appliance by means of which they could at *one time* accumulate such a head of water as to take from the pipe and irrigate their lands, and use for the other purposes mentioned in the decree, any amount of the water, even to the whole of it, which might be running or flowing in the pipe, provided that they did not thereafter use any more of the water until sufficient time had elapsed that as much water should have flowed through the pipe and past the defendants' lands as would have sufficed to equal the quantity used by them. In other words, the court below seems to have held that the defendants could use eighty inches constant flow of water, all that ran in the pipe, for one day, if they should not use any more water thereafter, and all the water in the pipe should be permitted by them to run by their lands so as to be used if required by other

parties in interest for as many days and parts of days as would result from dividing eighty by two and one third.

In our view of the matter, the defendants are entitled to use any appliance to obtain from this pipe a constant flow of two and one third inches of water, measured under a four-inch pressure, for the purposes mentioned in the decree above quoted, but they are not entitled to use that appliance to take from the pipe any more water than that. There must always be permitted to flow by their lands, unused by them, all except the amount of water just mentioned. They are not authorized to use any appliance in such a way as to obstruct the flow of the water in the pipe to any greater extent than that, and they are not to be permitted to take from the pipe any more water than a constant flow of two and one third inches under a four-inch pressure.

It is alleged by the defendants that during the pendency of the action in which the foregoing judgment was rendered, a stipulation was entered into between the parties, having reference to an enlargement of the pipes below the lands of the defendants; and the court finds that in consequence of such enlargement, the pressure of the water was so reduced that it was drawn away from the house of the defendants and the higher portion of their premises, so that they were unable to receive any water for domestic use and irrigation purposes. The court finds that these acts of the plaintiff in enlarging its pipes, whereby the pressure of the water was reduced, were "in violation of a stipulation entered into between the parties hereto," but does not find whether the stipulation was made before or after the commencement of the former action, or what were its terms. If by the terms of such stipulation, entered into after the commencement of the former action, the defendants acquired any rights in the waters of the cañon flowing through their lands in the pipes of the plaintiff other than or different from those specified in the judgment, they are entitled to be protected therein in the present action. Upon a new trial the court will find the terms of the stipulation, and ren-

der such judgment as will give to the respective parties the rights acquired thereby.

For the reason that the evidence shows that they took more water at one time than they were entitled to, and that the court below based its finding as to their right upon an erroneous construction of the former judgment, we are of opinion that it committed, in this respect, error. For these reasons, we advise that the order appealed from be reversed.

VANOLIEF, C., and BELOHER, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is reversed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

[No. 14609. Department One. — August 5, 1892.]

CHARLES H. DUNTON, RESPONDENT, v. WILLIAM NILES, APPELLANT.

EXCAVATION BY COTERMINOUS OWNER OF LAND—FALL OF ADJOINING BUILDING—BREACH OF AGREEMENT TO PAY DAMAGES—PLEADING—DEMURRER.—A complaint alleging that the defendant commenced to excavate upon a lot adjoining premises occupied by plaintiff's assignors as a warehouse; that upon a notification that the excavation, if continued, would undermine the warehouse and damage the goods of the occupants, the defendant promises to stop the work of excavating and discontinue the same, but notwithstanding his promise, continued to excavate in a negligent, unskillful, and careless manner, and carried away the earth from under the warehouse, causing the floor of the warehouse to fall through, together with the goods stored therein, whereby the goods were greatly damaged; that thereupon a settlement of the damages was demanded, which the defendant promised to pay as soon as the damages should be fully ascertained; that afterwards a compromise was agreed upon, whereby the defendant was to take certain tin plate at a stipulated price, and was to take away certain rivets, sort them over, and return the undamaged ones, and to pay all damages for

the rivets not returned; that the tin plate and rivets had been delivered to the defendant previous to the agreement, but that some of the rivets which were to be sorted and returned were so unskillfully sorted that the firm refused to receive them, and that the residue had never been sorted or returned, and that the firm were damaged thereby in a certain sum, but that the defendant had failed to pay any part of the damages, — states a cause of action for the breach of the agreement to pay for the goods delivered and the damages caused by the excavation, and is not demurrable, upon the ground of uncertainty, or that several causes of action are improperly united.

1D. — MATTER OF INDUCEMENT — UNCERTAINTY OF PLEADING. — The action is for breach of the oral agreement to pay what damages were agreed for excavating and removing the earth from under the warehouse and causing it to fall, and not merely for excavating upon the adjoining lot, and the previous recitals are of matter of inducement, and do not render the complaint uncertain.

1D. — AGREEMENT OF COMPROMISE — DISTINCT ITEMS — JOINDER OF CAUSES. — The fact that the agreement of compromise specifies several distinct items or payments to be made does not make them different causes of action, nor render the complaint demurrable for misjoinder of causes.

1D. — CONTRACT TO PAY DAMAGE — CONSIDERATION. — It is a sufficient consideration for the promise of the defendant to pay to the tenants of the warehouse the damage caused by the excavation that the owner of the warehouse authorized the defendant to erect a wall on the line for a party-wall, and that it was necessary for the defendant to dig under the warehouse and remove one of its walls, thereby causing the damage agreed to be paid.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

Chapman & Hendrick, for Appellant.

Brousseau & Hatch, and *Waldo M. York*, for Respondent.

TEMPLE, C.—Plaintiff, as assignee of W. W. Montague & Co., sues to recover damages for the breach of an alleged contract whereby defendant agreed to settle and pay to W. W. Montague & Co. certain damages to their goods, wares, and merchandise, caused by an excavation made by defendant adjoining and under their warehouse at Los Angeles, and also for certain tin sold and delivered to defendant.

The complaint is demurred to,—1. Generally, for in-

sufficient facts; 2. Uncertainty, in that it cannot be ascertained from it whether the action is brought to recover damages for the negligent excavation of the land adjoining the warehouse, or upon a contract to pay such damage, and a contract to pay for certain tin plate, or whether it is brought to recover the value of certain rivets taken by the defendant and not returned; 3. Several causes of action are improperly united, to wit, a cause of action for damages for negligence and unskillfulness in excavating adjoining the property of W. W. Montague & Co. with an action upon a contract to pay such damage; and said two causes of action with an action upon a contract to pay for tin plate, and for labor in sorting and boxing rivets, and all of said causes of action, and each of them, are improperly united with an action for damages for failure to sort certain other rivets; and further, that said several causes of action are not separately stated.

The complaint charges that on the first day of October, 1884, W. W. Montague & Co. rented from one Mills the premises known as 110 Upper Main Street, and lands adjoining thereto, for two years, with the privilege of an extension of two years; that Mills, in pursuance of the covenants of the lease, built a warehouse on the premises, which W. W. Montague & Co. took possession of, and where they stored a large amount of merchandise. The firm continued to occupy the premises until July, 1887. While W. W. Montague & Co. were so in the possession, defendant purchased the adjoining land from Mills, well knowing the rights of W. W. Montague & Co.

While the lessees were so occupying the premises, defendant commenced to excavate upon the adjoining lot purchased by him from Mills, and continued so to excavate up to May 28, 1887. May 25, 1887, W. W. Montague & Co. notified defendant that his excavation, if continued, would undermine their warehouse and damage their goods, and defendant then promised "that he would stop his said work of excavating and discontinue the same, but notwithstanding his said promise so to dis-

continue said work, said defendant continued to excavate in a negligent, unskillful, and careless manner, and in so excavating took and carried away the earth and soil from said land so as aforesaid aquired by him, defendant, from said Mills and his grantees, and next and adjoining said property, . . . and negligently and unskillfully carried away the earth and soil from under said warehouse, until the defendant had excavated to a depth of sixteen feet below the ancient surface of defendant's said land, and below and under said warehouse, and was so carelessly and negligently excavating on the twenty-eighth day of May, 1887, when, by reason of said excavation so as aforesaid carelessly and negligently made by defendant under said warehouse and on said lands adjoining thereto, the earth and soil under said warehouse gave way and fell into said excavation, and the floor of said warehouse fell through, and goods, wares, and merchandise of said firm of W. W. Montague & Co. then stored therein fell into said excavation, and were damaged thereby in the sum of one thousand dollars."

On the 28th of May, thereafter, W. W. Montague & Co. demanded from defendant that he settle and pay the damage, which he promised to do as soon as the damages should be fully ascertained.

Thereafter, about June 15, 1887, W. W. Montague & Co. and the defendant agreed upon a compromise of the said claim for damages, whereby defendant was to pay one hundred dollars for certain tin plate which defendant should take, and for certain labor in boxing it, and was to take away certain rivets, and sort the same, and return such as could be sorted and placed in as good condition as they were in before the damage occurred, and then were to pay all damages to the firm for the rivets which should not be so returned; that previous to said agreement, the said firm delivered to defendant and defendant received the tin plate which he was to have for his own use, and also all the rivets which had been damaged to be sorted; that some rivets were sorted

by defendant and returned, but some were so unskillfully sorted that the said firm refused to receive and accept them under the agreement; that the residue have never been sorted or returned; that the rivets were so damaged as to be of no value as rivets whatever, and that before the damage they were worth \$520; that defendant has not paid the \$250 damage, or the said \$100 for said tin, or any part of either sum, and the whole is due and unpaid.

The contention that the complaint does not state facts sufficient to constitute a cause of action is based principally upon the claim that the action is for damages resulting from excavating upon an adjoining lot; and appellant contends, that under the circumstances stated, defendant is not liable for injury to the building or goods of W. W. Montague & Co. It does not appear that the land unburdened by the building would have fallen in because of the excavation, and want of notice is not averred, but on the other hand, knowledge of the excavation is shown.

And on the theory that the action is for the breach of an oral contract to pay the damage, it is contended there is no consideration for such promise.

Both these propositions are sufficiently answered by the suggestion that there is a distinct charge in the complaint that defendant not only excavated on the adjoining lot, but also excavated and removed the earth from under the building, thereby causing it to fall. It is not a question, therefore, of liability for an excavation made by a coterminous owner upon an adjacent lot. The action is clearly for the breach of the oral agreement to take certain tin and pay certain expenses and damages, and the previous recitals are simply matters of inducement. In this view, the uncertainty specified does not exist; nor are there several causes of action united in the complaint. The agreement of compromise specifies several distinct items or payments to be made, but they do not constitute different causes of

action. I think, therefore, the demurrer was properly overruled.

The court having found for the plaintiff, defendant applied for a new trial, which having been refused, he appeals from the judgment and order.

It appears from the evidence that prior to the commencement of the excavation, defendant notified W. W. Montague & Co. of the intended excavation, and of the agreement between defendant and Mills to erect a party-wall which would render it necessary to remove one side of the warehouse; also that the building extended some eight inches upon defendant's lot. Plaintiff, who was then managing for W. W. Montague & Co., objected, and pointed out the danger to the building and goods; defendant assured him that he would move the goods, and do everything necessary to prevent injury and inconvenience to W. W. Montague & Co., whereupon plaintiff, as agent, consented to the work being done. After the work had proceeded for some time, plaintiff noticed that the excavation was deep and extended under the building, and called defendant's attention to the danger. Defendant then agreed to stop work at the point of danger, but did not, and in consequence the bank caved and the building gave way, and the damage resulted.

These facts, I think, take the case entirely out of the rule laid down in section 832 of the Civil Code.

There was a consideration for the promise on the part of defendant, in that Mills, the owner of the building, authorized the erection of a wall on the line for a party-wall, and that it was necessary to dig under the warehouse and remove one of its walls.

And then the agreement to cease work would of itself excuse plaintiff's assignors from shoring up their own building.

Appellant contends that the evidence does not justify the finding that defendant promised that he would settle and pay the damage.

As to the tin plate, Dunton's testimony seems quite sufficient, and in fact hardly controverted by defendant,

except as to the delivery of the tin to him. As the testimony on this point is conflicting, we must accept the evidence which sustains the finding. I think this, including Dunton's evidence in rebuttal, shows a delivery.

As to the rivets, there is very little except the testimony of Dunton, and that is not as definite as it might be.

This inquiry, however, must commence at the beginning. Niles, aware that he was attempting something which required the assent of plaintiff's assignors, had promised to so conduct the work as to save them from any inconvenience. As soon as he saw the condition after the cave, according to the witnesses Ford and Hanes, he said he would make it all right; that he would make it satisfactory; would fix it, whatever the damage was.

Dunton seems to have been under the impression that Niles was to take the rivets and pay for them. Such is not the allegation in the complaint, nor the statement in the findings. Except the confident assumption of the witness, I find no evidence of any such arrangement. It appears from this testimony, as I think it substantially averred and found, that the agreement was, that plaintiff would waive damages as to such rivets as would be sorted, and defendant would, after his attempt to sort them, pay whatever the damage to them might be. This did not make Niles the owner of the rivets, and if they were worth anything in their damaged condition, Niles would not be charged with their full value. I understand plaintiff in his testimony to admit that they were worth one hundred dollars. In that case, the amount of damage found was excessive in just that amount.

The other specifications of insufficiency need not be discussed. They are either practically answered by what has already been said or are immaterial.

I think there is evidence which tends to prove that notwithstanding the contract with Mendoza, defendant still continued to manage and control the work of excavation; and further, that under the peculiar circum-

stances of this case defendant would remain liable for damage resulting from the excavation.

I think the judgment should be reversed, unless plaintiff, within twenty days after filing the *remittitur*, shall stipulate to a reduction of one hundred dollars on the judgment, in which case the judgment so modified should be affirmed.

BELCHER, C., and VANCLIEF, C., concurred.

For the reasons given in the forgoing opinion, the cause is remanded, with instruction to the court below to modify the judgment, by allowing to the plaintiff the sum of \$520 instead of \$620, with interest thereon from December 12, 1887, with costs of suit, if the plaintiff shall, within twenty days after filing the *remittitur*, stipulate that such reduction be made; but if he does not so stipulate, the court is directed to set aside the judgment and order a new trial.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14841. Department Two. — August 5, 1892.]

FLORA MORGAN, RESPONDENT, v. THE SOUTHERN PACIFIC COMPANY, APPELLANT.

NEGLIGENCE — BACKING OF TRAIN AT STATION — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action for personal injuries caused by the alleged negligence of the engineer of a passenger train in backing the train after stopping at a station, while the plaintiff was alighting from the train, where the evidence is conflicting as to the period of time between the stop and the movement backwards, the question of contributory negligence of the plaintiff in leaving her seat in the car before the train stopped is fairly within the province of the jury to decide.

ID. — RECOMPENSE FOR PAIN — COMPENSATORY DAMAGE — INACCURATE INSTRUCTION — HARMLESS ERROR. — In such action, an instruction to the jury that "money is an inadequate recompense for pain," though not an appropriate expression in a charge to the jury upon the question of compensatory damage, does not constitute a reversible error, where the jury are also instructed that resulting pain is an element of damage to be compensated, and that if the plaintiff was entitled to recover. "the measure of her recovery is what is called compensatory damages,

—that is such sum as will compensate her for the injury she has sustained"; that "the determination of the amount is committed to the judgment and sound discretion of the jury;" and that it should be "in such measure as a jury, dispassionately considering all the circumstances of the case, will allow."

1D. — **EXCESSIVE DAMAGES.** — A verdict will not be disturbed because excessive, unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.

1D. — **EARNING OF PLAINTIFF.** — The rule that damages recoverable for injuries received because of the negligence of a defendant should not exceed an amount upon which the legal interest would equal the value of the injured party's past earnings and probable future earnings does not apply to a case where the cause of action is the plaintiff's own personal injury, but is applied only to cases where suit is brought for the death of a relative.

1D. — **VERDICT NOT EXCESSIVE — CONFLICTING EVIDENCE.** — A verdict for fifteen thousand dollars for personal injuries received through the negligence of a railroad company held not excessive under the circumstances of this case, there being evidence tending to show a permanent injury, accompanied with continual suffering and disability, which the jury would be warranted in believing, notwithstanding conflicting evidence as to the extent of the injury.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

E. L. Craig, Foshay Walker, Horace Hawes, and B. B. Carpenter, for Appellant.

The damages awarded by the jury are grossly excessive, and were evidently given under the influence of passion and prejudice. What constitutes compensatory damages is a question of law. (*Dorsey v. Manlove*, 14 Cal. 553.) No damages in this case can be sustained on the ground that they are exemplary, as there must be oppression, fraud, or malice, in order to warrant them. (*Yerian v. Linkletter*, 80 Cal. 135; *Railway Co. v. Freeman*, 36 Ark. 41.) The damages in all these cases must be compensatory, and not exemplary. (*Munroe v. Dredging Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *Conant v. Griffin*, 48 Ill. 410; *Railway Co. v. Henderson*, 51 Pa. St. 315; *Railway Co. v. Kelly*, 24 Ind. 271; *Railway Co. v. Rowan*, 66 Pa. St. 393.) Plaintiff cannot recover smart-money.

(*Moody v. McDonald*, 4 Cal. 299; *Wardrobe v. Cal. Stage Co.*, 7 Cal. 120; 68 Am. Dec. 231.) Where the amount of the verdict is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or suggests, at first blush, passion, prejudice, or corruption on the part of the jury, the verdict will be set aside. (*Aldrich v. Palmer*, 24 Cal. 515; *Tarbell v. Central Pac. R. R. Co.*, 34 Cal. 623; *Kinsey v. Wallace*, 36 Cal. 480, 481; *Wheaton v. Railway Co.*, 36 Cal. 591.) When it is clear that the verdict is so disproportionate to the injury produced as to show that the jury must have acted under passion or prejudice, the verdict will be set aside. (*Russell v. Dennison*, 45 Cal. 337; 50 Cal. 243, where verdict of seven thousand dollars was reduced to three thousand five hundred dollars.) If plain that the jury adopted a rule of compensation not warranted by the evidence, the verdict will be set aside. (*Karr v. Parks*, 44 Cal. 50.) A verdict greatly disproportionate to the actual damage shown by the facts of the case is of itself sufficient evidence that it was rendered under the influence of passion or prejudice. (*Kinsey v. Wallace*, 36 Cal. 481; *McCarty v. Fremont*, 23 Cal. 198; 83 Am. Dec. 96.) There must never be any verdict so large that the annual interest upon it will exceed all the probable annual earnings of the injured person, or that is manifestly greater than the pecuniary loss could possibly be, especially where it appears that the person injured is without property, or has no reasonable expectation of accumulating any. (Cooley on Torts, 274; *Railway Co. v. Bayfield*, 37 Mich. 205; *Rose v. Railway Co.*, 39 Iowa, 254.) In the following cases the verdicts were held excessive: \$3,262, eye of child disfigured and destroyed (*Karr v. Parks*, 44 Cal. 47); \$7,500, malicious prosecution (*Phelps v. Cogswell*, 70 Cal. 203); \$6,000, plaintiff's leg broken, sick eight months (*Collins v. Railway Co.*, 12 Barb. 492); \$1,525, ankle sprained (*Railway Co. v. Dunn*, 52 Ill. 451); \$2,500, young woman's leg injured; had not recovered three years after (*Railway Co. v. Pauzant*, 87 Ill. 125); \$3,000, injury to servant-girl (*Decatur v. Fisher*,

53 Ill. 407); \$4,000, broken leg (*Lombard v. Railway Co.*, 47 Iowa, 494); \$4,500, fracture of arm (*Railway Co. v. Hughes*, 87 Ill. 94); \$5,000, deformity of right hand (*Railway Co. v. Hand*, 7 Kan. 380); \$5,000, temporary loss of eye (*Tinny v. Railway Co.*, 5 Lans. 507); \$6,600, arm fractured of five-year-old child; permanent injury (*Ryder v. New York*, 50 N. Y. Sup. Ct. 220). (See also 3 Lawson's Rights, Remedies, and Practice, sec. 1222; *Railway Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724; *Railway Co. v. Ware*, 84 Ky. 267; *Missouri Pac. R'y Co. v. Texas Pac. R'y Co.*, 41 Fed. Rep. 315.) The court erred in instructing the jury that "money is an inadequate recompense for pain." (*Yerian v. Linkletter*, 80 Cal. 135; *Moody v. McDonald*, 4 Cal. 299; *Wardrobe v. Cal. Stage Co.*, 7 Cal. 120; 68 Am. Dec. 231.) The evidence in this case is wholly insufficient to authorize any finding of liability on the part of the defendant for the injury to plaintiff. The following authorities fully sustain the proposition that plaintiff's actions under all the circumstances constitute contributory negligence in law: *Glascok v. Central Pac. R. R. Co.* 73 Cal. 141; *Secor v. Railway Co.*, 10 Fed. Rep. 15; *Jewell v. Railway Co.*, 54 Wis. 610; 41 Am. Rep. 63; *Railway Co. v. Hoosey*, 99 Pa. St. 492; 44 Am. Rep. 120; *Railway Co. v. Hayes*, 97 N. Y. 259; *Adams v. Railway Co.*, 82 Ky. 603; *Railway Co. v. Schaufler*, 75 Ala. 136; *Lindsay v. Railway Co.*, 64 Iowa, 407; *Burrows v. Railway Co.*, 63 N. Y. 556; *Hunter v. Railway Co.*, 112 N. Y. 371; 8 Am. St. Rep. 752; *Paulitsch v. Railway Co.*, 102 N. Y. 280; *Railway Co. v. Walten*, 65 Tex. 568; *Whelan v. Railway Co.*, 84 Ga. 506; *Walker v. Railway Co.*, 41 La. Ann. 795; 17 Am. St. Rep. 417; *Dwyer v. Railway Co.*, 28 Am. & Eng. R. R. Cas. 155; *Vimont v. Railway Co.*, 71 Iowa, 58; *Railway Co. v. Bangs*, 47 Mich. 470; *Raben v. Railway Co.*, 73 Iowa, 579; 5 Am. Rep. 708; *Railway Co. v. Felton*, 125 Ill. 458; *Railway Co. v. Euches*, 127 Pa. St. 316; 14 Am. St. Rep. 848; *Railway Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *Railway Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505.

Charles G. Lamberson, J. W. Ahern, and Lamberson & Taylor, for Respondent.

The instruction to the jury in which occurred the words "money is an inadequate compensation for pain" was not erroneous when taken in connection with the rest of the instruction. It was certainly in no wise misleading to the jury to state that money was an inadequate recompense for pain, because that is a matter which is within the knowledge of every human being; that no money can adequately compensate any person for the pain which is suffered by them. (3 Sutherland on Damages, 711; *Ransom v. New York etc. R. R. Co.*, 15 N. Y. 415.)

McFARLAND, J.—This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a railroad company. It is averred in the complaint that while plaintiff was in the act of alighting from the car of defendant, it was, through the negligence of defendant's servants and employees, suddenly and violently put in motion, whereby plaintiff was, without any fault on her part, thrown upon the ground, and seriously injured. The jury gave a verdict in favor of plaintiff for fifteen thousand dollars, for which amount judgment was rendered; and defendant appeals from the judgment, nad from an order denying its motion for a new trial.

1. The point of appellant that the evidence was insufficient to warrant *any* finding of liability on the part of defendant for the injury complained of cannot be maintained.

The accident happened at the town of Delano. At that place the train usually stops with the locomotive at a water-tank, so that water may be taken for the engine while passengers are going off and on the train. When the train arrived on the evening of the accident, the engineer did not succeed in stopping it until the locomotive had gone about a car's length beyond the water-tank; and he moved the train back far enough to bring

the engine at the proper place to take water. He testified that he did this immediately, so that there was only a moment of time between the first stop and the commencement of the backward movement; and his testimony to this effect was to some extent corroborated. Counsel for appellant contends that this fact being established, it follows that plaintiff must have been guilty of contributory negligence; because, if she had retained her seat in the car until the train first stopped, as she ought to have done, she would not have been on the steps of the platform when the train started back. It is argued that she must have been wrongfully on or near the steps before the car stopped. But witnesses for the plaintiff testified that it was from a half-minute to a minute after the train stopped before it started back; plaintiff testified that she did not leave her seat until the car stopped; and another witness testified that she was not on the platform when the train stopped. There was therefore a substantial conflict of evidence as to the period of time which elapsed between the stop and the beginning of the movement backward. Counsel say that it was natural, and in accordance with the usual course of things, for the engineer to have immediately reversed his engine and started back when he found himself beyond the water-tank; that there was no reason for his waiting thirty or sixty seconds before doing so; and that therefore the contrary testimony of plaintiff's witnesses should not be considered as raising a substantial conflict. It could be well argued, and no doubt was so argued to the jury, that the engineer's version of the affair was more probably correct than that of plaintiff's witnesses; but after all, the question was one of probability, to be determined by weighing conflicting evidence. It was therefore a question fairly within the province of the jury to decide.

2. The court, in the course of its charge to the jury, used the following language: "Money is an inadequate recompense for pain; but as the law can afford no other redress, it aids the sufferer to obtain this in such meas-

ure as a jury, dispassionately considering all the circumstances of the case, will allow; and whether the injury is the result of negligence or direct personal violence, the resulting pain is an element of damage to be compensated. In other words, it is an element of compensatory damage." And appellant contends that the use of the words "money is an inadequate recompense for pain" constitutes a material and reversible error.

The language objected to would, no doubt, be more appropriate to social and private conversations and disputations than to the grave duty of instructing a jury, in discharging which the utmost possible accuracy should be aimed at, and loose general remarks avoided. The remark objected to is probably true in a general abstract sense, although it can hardly be considered as specially apropos to a charge in which the jury are told that money may be given as a recompense for pain. But taken in connection with other parts of the instruction, we do not see how the language objected to could have influenced the jury to the prejudice of appellant. Counsel contend that by this language the court invited the jury to give any sort of damages they might see fit to give, compensatory or exemplary, and to any amount within the prayer of the complaint, and that in effect it told them that no matter how large their verdict might be, it would still be "an inadequate recompense for [plaintiff's] pain." But such would be a strained and incorrect construction of the language used; and it is not to be presumed that a jury would give it any such meaning. The whole charge was upon the theory that exemplary damages could not be given; and at appellant's request the court expressly instructed the jury that if plaintiff was entitled to recover, "the measure of her recovery is what is called compensatory damages,—that is, such sum as will compensate her for the injury she has sustained." The jury were correctly told that "the determination of the amount is committed to the judgment and sound discretion of the jury"; and that it should be "in such measure as a jury, dispassionately

considering all the circumstances of the case, will allow"; and we do not think that the weight of these instructions could be lessened to any appreciable extent by the general remark which appellant assails.

3. The most difficult question in the case is raised by appellant's point that the damages awarded by the jury are excessive.

The amount of the verdict is certainly quite large,—larger than we, if sitting as a jury, would have felt it our duty to give. But that consideration alone is not sufficient to warrant us in disturbing the verdict. There is no absolute rule in such a case; and about all that can be safely said on the subject may be found in the opinion of the court in *Aldrich v. Palmer*, 24 Cal. 513, and the cases there cited. The general conclusion, as nearly as one can be formulated, is as there stated, namely, that a verdict will not be disturbed because excessive, "unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."

Cases are cited where verdicts for damages less than the amount awarded in the case at bar have been set aside; but there are many cases where verdicts for larger amounts have been allowed to stand. Two cases exactly alike are not to be found. Counsel argue that because in the case at bar legal interest on the amount of the verdict would exceed in value plaintiff's past earnings, and her probable future earnings if she had not been injured, therefore the amount is excessive. But that rule has never to our knowledge been applied to a case where the cause of action was the plaintiff's own personal injury; it has been applied only to cases where suit has been brought for the death of a relative. Such was the fact in the authorities cited in the point by appellant. (Cooley on Torts, 274; *Railroad Co. v. Bayfield*, 37 Mich. 205; *Rose v. Railroad Co.*, 39 Iowa, 254.)

The great difficulty in the present case is in determining the extent of plaintiff's injuries,—or rather, what

conclusion the jury had the right to arrive at from the evidence as to the extent of those injuries. As no bones were broken, and there was but little external evidence of injury, it is no doubt possible that plaintiff's sufferings from the result of the accident, and its injurious effect upon her physical and mental health, may have been greatly exaggerated. But there was direct testimony to the points that she was greatly injured in the right arm and shoulder; that the internal ligaments of the shoulder joint were seriously ruptured; that she suffered great pain, and at the time of the trial, nearly two years after the accident, still suffered great pain in the right arm and shoulder, in the back of the head and neck, and in the chest; that her memory was at times impaired; that she was unable to earn a livelihood, and practically unable to do work or perform services of any value; that but little progress had been made towards recovery; and that her injuries would probably be permanent. There was, no doubt, some evidence tending to show that her condition was not as bad as above stated; but the issue as to the extent of her injury was one of fact, about which there was a substantial conflict of evidence; and we cannot say that the jury were not warranted in finding according to the direct testimony above referred to. And such being the case, we are not prepared to say that the verdict should be set aside for excessiveness in the amount of damages.

There are no other points in the case requiring notice. Judgment and order appealed from are affirmed.

DR HAVEN, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 14832. Department Two. — August 5, 1892.]

**FLORA MORGAN, RESPONDENT, v. THE SOUTHERN
PACIFIC COMPANY, APPELLANT,**

NEGLECT — EXCESSIVE DAMAGES — NEW TRIAL. — Where the amount of damages given in an action for damages for negligence are obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict will be set aside as excessive.

ID. — ACTION FOR DEATH — MEASURE OF DAMAGES — PECUNIARY LOSS — SORROW AND MENTAL ANGUISH — LOSS OF SOCIETY. — In an action to recover damages for the death of a relative, caused by negligence, the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative. Sorrow and mental anguish caused by the death are not elements of damage in such a case, and nothing can be recovered as a *solatium* for wounded feelings; and the loss of society can only be considered for the purpose of estimating the pecuniary loss.

ID. — DEATH OF MINOR CHILD — ACTION BY MOTHER — EXCESSIVE DAMAGES — PLEADING — PROOF. — A verdict for twenty thousand dollars for the death of an infant child, given in an action by the mother to recover damages for its death, alleged to have been caused by the negligence of the defendant, will be set aside as excessive, especially where there was no averment in the complaint of any special damage, and there was no evidence whatever introduced or offered upon the subject of damage.

ID. — VALUE OF SERVICES — PECUNIARY INJURY TO PARENT. — In an action by the parent to recover damages for the death of a minor child, caused by the negligence of the defendant, the main element of damage is the probable value of the services of the deceased until its majority, considering the cost of its support and maintenance during the early and helpless part of its life; and a charge to the jury that they were not limited by the actual pecuniary injury sustained by the parent by reason of the death of the child is error.

ID. — PLEADING — LOSS OF SERVICE — SPECIAL DAMAGE. — The loss of the services of the deceased child is not special damage necessary to be averred, but is a natural and necessary sequence of the death.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

E. L. Craig, Foshay Walker, Horace Hawes, and B. B. Carpenter, for Appellant.

No damages in this state can be sustained on the ground that they are exemplary, as there must be op-

pression, fraud, or malice in order to warrant them. (*Yerian v. Linkletter*, 80 Cal. 135; *R'y Co. v. Freeman*, 36 Ark. 41.) In ascertaining the damages which are recoverable in such cases as this, pecuniary damage alone is taken into account, and there can be no *solatium* for wounded feelings or loss of comfort and companionship. (*Blake v. Midland R'y Co.*, 18 Ad. & E., N. S., 93; *Pennsylvania Co. v. Lilly*, 4 Am. & Eng. R. R. Cas. 540; 73 Ind. 252; *R'y Co. v. Freeman*, 36 Ark. 41; *R'y Co. v. Brown*, 26 Kan. 443; 40 Am. Rep. 320; *Iron Co. v. Rupp*, 100 Pa. St. 95; *Porter v. R'y Co.*, 2 Am. & Eng. R. R. Cas. 44; 71 Mo. 83; 36 Am. Rep. 454; *R'y Co. v. Sykes*, 2 Am. & Eng. R. R. Cas. 254; *Webb v. R'y Co.*, 24 Pac. Rep. 616; *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago v. Scholten*, 75 Ill. 468; *Chicago v. Harwood*, 88 Ill. 88; *R'y Co. v. McCloskey's Adm'r*, 23 Pa. St. 256; 62 Am. Dec. 332; *R'y Co. v. Decker*, 84 Pa. St. 419; *R'y Co. v. Miller*, 2 Col. 442; *R'y Co. v. Paulk*, 24 Ga. 356; *Barley v. R'y Co.*, 4 Biss. 430; *Kesler v. Smith*, 66 N. C. 154; *Green v. R'y Co.*, 32 Barb. 25; *Paulmier v. R'y Co.*, 34 N. J. L. 151; *Donaldson v. R'y Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72; *March v. Walker*, 48 Tex. 372; *R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *R'y Co. v. Packer*, 9 Bush, 455; 15 Am. Rep. 725; *James v. Christy*, 18 Mo. 162; *Hyatt v. Adams*, 16 Mich. 180.) For the death of a child, parents are only entitled to the value of his services during his minority, less the cost of raising the child. (*Caldwell v. Brown*, 53 Pa. St. 452; *State v. R. R. Co.*, 24 Md. 117; *R'y Co. v. Kelly*, 31 Pa. St. 370; 72 Am. Dec. 747; *Telfer v. R'y Co.*, 30 N. J. L. 198; *Walters v. R'y Co.*, 36 Iowa, 458; *R'y Co. v. Delany*, 82 Ill. 198; *McGovern v. R'y Co.*, 67 N. Y. 417.) And in determining the value of these services, the occupation and condition in life of the plaintiff may be taken into account. (*Ewen v. R'y Co.*, 38 Wis. 613; *Barley v. R'y Co.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169; 89 Am. Dec. 418.) The jury cannot take into account the opportunities of acquiring wealth or fortune by change of circumstances of life. (*Mans-*

field Coal and Coke Co. v. McEnery, 8 Week. Not. Cas. 83.) The damage in all cases must be compensatory, and not exemplary. (*Munro v. Dredging Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *Conant v. Griffin*, 48 Ill. 410; *R'y Co. v. Henderson*, 51 Pa. St. 315; *R'y Co. v. Kelly*, 24 Md. 271; *R'y Co. v. Rowan*, 66 Pa. St. 393.) No damages having been proven, none should have been found. The principle by which damages are assessed is pecuniary compensation, and not *solatium*. No compensation can be given for wounded feelings, mental or physical pain, or the loss of comfort or companionship of a relative. (*Blake v. R'y Co.*, 18 Q. B. 93; *Burke v. R'y Co.*, 10 Cent. L. J. 48; *State v. R'y Co.*, 24 Md. 84; 87 Am. Dec. 600; *Porter v. R'y Co.*, 71 Mo. 66; 36 Am. Rep. 454; *Rains v. R'y Co.*, 71 Mo. 164; 36 Am. Rep. 459.) Such being the case, the recovery in this case is limited to actual damage, and none having been either alleged or proved, none can be recovered. (2 Thompson on Negligence, 1293; *Brown v. Emerson*, 18 Mo. 103; *Owen v. O'Reilly*, 20 Mo. 603.) In the case of an infant child, only physician's bill and funeral expenses, if alleged or proved, can be recovered. (*Pack v. Mayor*, 3 N. Y. 489.) As the damages should be confined to compensation for the pecuniary loss, it is erroneous to leave the question of the amount to the uncontrolled discretion of the jury. (Sedgwick on Damages, 6th ed., 698, note; *R'y Co. v. Candever*, 36 Pa. St. 298; *R'y Co. v. Ogier*, 35 Pa. St. 60; 78 Am. Dec. 332; Field on Damages, 498.) Plaintiff cannot recover smart-money. (*Moody v. McDonald*, 4 Cal. 299; *Wardrobe v. Cal. Stage Co.*, 7 Cal. 120; 68 Am. Dec. 231.) Where the amount of the verdict is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or suggests, at first blush, passion, prejudice, or corruption on the part of the jury, the verdict will be set aside. (*Aldrich v. Palmer*, 24 Cal. 515; *Tarbell v. Cent. P. R. R. Co.*, 34 Cal. 623; *Kinsey v. Wallace*, 36 Cal. 480, 481; *Wheaton v. R'y Co.*, 36 Cal. 591.) When it is clear that the verdict is so dispro-

portionate to the injury produced as to show that the jury must have acted under passion or prejudice, the verdict will be set aside. (*Russell v. Dennison*, 45 Cal. 337; 50 Cal. 243.) If plain that the jury adopted a rule of compensation not warranted by the evidence, the verdict will be set aside. (*Karr v. Parks*, 44 Cal. 50.) A verdict greatly disproportionate to the actual damage shown by the facts of the case is of itself sufficient evidence that it was rendered under the influence of passion or prejudice. (*Kinsey v. Wallace*, 36 Cal. 481; *McCarty v. Fremont*, 23 Cal. 198; 83 Am. Dec. 96.) In the following cases verdicts were set aside as excessive: \$3,262, eye of child disfigured and destroyed (*Karr v. Parks*, 44 Cal. 47); \$7,500, malicious prosecution; reduced to \$1,000 (*Phelps v. Cogswell*, 70 Cal. 203); \$1,800, death of girl five years old (*R'y Co. v. Lilly*, 73 Ind. 252); \$4,000, death of unmarried man (*Carpenter v. R'y Co.*, 38 Hun. 116); \$10,000, death of son (*R'y Co. v. Brown*, 26 Kan. 443; 40 Am. Rep. 320); \$4,500, death of child five years old (*R'y Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44); \$3,000, death of girl ten years old (*Potter v. R'y Co.*, 21 Wis. 372; 94 Am. Dec. 548); \$10,000, death of man twenty-seven years old (*Vaughn v. R'y Co.*, 83 Cal. 19, 22). (See, generally, as to excessive verdict cases, 3 Lawson's Rights, Remedies, and Prictice, sec. 1222.) Juries are not warranted in finding verdicts for sums disproportionate to or in excess of the probable pecuniary loss of the parent occasioned by the death of a child. Reasonable pecuniary damages only, in view of all the circumstances in evidence, should be awarded, and nothing by way of *solatium*. (*R'y Co. v. Barstow*, 54 Pa. St. 496; *R'y Co. v. Barker*, 33 Ark. 361; 34 Am. Rep. 44.) There must be no verdict so large that the interest upon it would exceed all the probable earnings of the deceased during minority (or even during the whole life), and is manifestly greater than the pecuniary loss could possibly be, especially when it appears that deceased was without property, or it does not appear that she had any, and no reasonable expectations of accumulating any. (*Cooley*

on Torts, 274; *R'y Co. v. Bayfield*, 37 Mich. 205; *Rose v. R'y Co.*, 39 Iowa, 254.) The evidence in this case is wholly insufficient to authorize any finding of liability on the part of the defendant for the death of the child in question, even though plaintiff had averred or proved any damages. The following authorities fully sustain the proposition that plaintiff's actions, under all the circumstances, constitute contributory negligence in law: *Glascoek v. Cent. P. R. R. Co.*, 73 Cal. 141; *Secor v. R'y Co.*, 10 Fed. Rep. 15; *Jewell v. R'y Co.*, 54 Wis. 610; 41 Am. Rep. 63; *R'y Co. v. Hoosey*, 99 Pa. St. 492; 44 Am. Rep. 120; 2 *R'y Co. v. Hayes*, 97 N. Y. 259; *Adams v. R'y Co.*, 82 Ky. 603; *R'y Co. v. Schaufler*, 75 Ala. 136; *Lindsay v. R'y Co.*, 64 Iowa, 407; *Burrows v. R'y Co.*, 63 N. Y. 556; *Hunter v. R'y Co.*, 112 N. Y. 371; 8 Am. St. Rep. 752; *Paulitsch v. R'y Co.*, 102 N. Y. 280; *R'y Co. v. Wallen*, 65 Tex. 568; *Whelan v. R'y Co.*, 84 Ga. 506; *Walker v. R'y Co.*, 41 La. Ann. 795; 17 Am. St. Rep. 417; *Dwyer v. R'y Co.*, 28 Am. & Eng. R. R. Cas. 155; *Vimont v. R'y Co.*, 71 Iowa, 58; *R'y Co. v. Bangs*, 47 Mich. 470; *Raben v. R'y Co.*, 73 Iowa, 579; 5 Am. St. Rep. 708; *R'y Co. v. Felton*, 125 Ill. 458; *R'y Co. v. Euches*, 127 Pa. St. 316; 14 Am. St. Rep. 848; *R'y Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *R'y Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505.

Charles G. Lamberson, J. W. Ahern, and Lamberson & Taylor, for Respondent.

Appellant claims that the complaint in this action does not state facts sufficient to constitute a cause of action, because no special damages are alleged; but so far as our examination of the matter goes, such position is directly opposed to all authority in existence. (1 *Estee's Pleading*, secs. 1841, 1851; *Gay v. Winter*, 34 Cal. 153; 1 *Sutherland on Damages*, 763; *Code Civ. Proc.*, secs. 376, 377.) It is contended on the part of appellant that the damages given in this case are excessive. The statute provides that in such cases as this such damages may be given as under all the circumstances of the case may be just, and

in every instance we have been able to find in this state the court has sustained that view of the case, and permitted the verdict of the jury to stand. (*Beeson v. G. M. Co.*, 57 Cal. 20; *Cook v. R. R. Co.*, 60 Cal. 604; *Nehrbas v. C. P. R. R. Co.*, 62 Cal. 320; *McKeever v. Market St. R. R. Co.*, 59 Cal. 294.) The jury were not limited to the actual pecuniary injury sustained by the plaintiff, in estimating the damages. (*Nehrbas v. C. P. R. R. Co.*, 62 Cal. 320; *Cleary v. City R. R. Co.*, 76 Cal. 240; *Munro v. Dredging Co.*, 84 Cal. 515; 18 Am. St. Rep. 248.)

McFARLAND, J. — The parties to this action are the same as in *Morgan v. Southern Pacific Company*, ante, p. 501, this day decided, in which plaintiff recovered a judgment for fifteen thousand dollars for alleged personal injuries received by being thrown from the steps of defendant's car, which judgment was by this court affirmed. When she fell from the steps of the car she had in her arms her infant daughter, aged about two years; nine days afterwards the child died from an attack of pneumonia; and plaintiff brought this present action to recover damages for the death of said child, upon the theory that the pneumonia was caused by said fall. The jury gave her damages in the amount of twenty thousand dollars, for which sum judgment was rendered; and defendant appeals from the judgment, and from an order denying a motion for a new trial.

The evidence upon the issues of the alleged negligence of defendant's employees at the time of the accident, and the alleged contributory negligence of plaintiff, was substantially the same as in the other case; and as to those issues the verdict cannot be disturbed. There was some evidence tending slightly to show that the death of the child was caused by the accident, but it is not necessary to inquire whether or not it was sufficient to establish that fact, because the judgment must clearly be reversed on account of the excessive damages awarded by the jury.

There was no averment in the complaint of any

special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars"; and there was no evidence whatever introduced or offered upon the subject of damage. The jury therefore had nothing before them upon which to base damages, except the naked fact of the death of a female child two years old; and it is apparent at first blush that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."

The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a *solatium* for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: *R. R. Co. v. Vandever*, 36 Pa. St. 298; *Iron Co. v. Rupp*, 100 Pa. St. 95; *R. R. Co. v. Freeman*, 36 Ark. 41; *R. R. Co. v. Brown*, 26 Kan. 443; 40 Am. Rep. 320; *Penn. Co. v. Lilly*, 73 Ind. 252; *Donaldson v. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *R. R. Co. v. Paulk*, 24 Ga. 356; *R. R. Co. v. Miller*, 2 Col. 466; *Kesler v.*

Smith, 66 N. C. 154; *March v. Walker*, 48 Tex. 372; *R. R. Co. v. Levey*, 59 Tex. 563; 46 Am. Rep. 278; *James v. Christy*, 18 Mo. 162; *Hyatt v. Adams*, 16 Mich. 180; *Chicago v. Mayor*, 18 Ill. 349; 68 Am. Dec. 553; *R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308; *Blake v. Midland R. R. Co.*, 18 Q. B. 93.

With respect to the decisions in this state, we do not think those cited by respondent (except one) are, when closely examined, inconsistent with the general authorities. *Beeson v. G. M. G. M. Co.*, 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was, whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; . . . but in another sense, it *might* be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured, or at least considered, from a pecuniary standpoint. . . . If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording *solace* in money, but for the purpose of estimating *pecuniary* losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case, where the same rule was applied to the loss

of a wife, the court saying that "certainly the service of a wife is *pecuniarily* more valuable than that of a mere hireling." The Beeson case, therefore, does not decide that the jury may depart from a pecuniary standpoint in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband, they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated.

Cook v. Clay Street Hill R. R. Co., 60 Cal. 604, also cited by respondent, decides nothing more than the Beeson case.

In *McKeever v. Market Street R. R. Co.*, 62 Cal. 320, the point was not involved; and in *Nehrbas v. C. P. R. R. Co.*, 62 Cal. 320, the point does not appear in any way to have been involved, and the *dictum* at the close of the opinion, as it refers to the Beeson case, must be held as only intended to go to the length of the latter case.

It is true, however, that in *Cleary v. City R. R. Co.*, 70 Cal. 240, a decision in Department, views were expressed favorable to respondent's contention. The opinion of the commission in that case was, however, expressly based on *Beeson v. G. M. G. M. Co.*, 57 Cal. 20, and upon, as we have seen, a misunderstanding of that case. There appears to have been no petition for a hearing in Bank. It was stated in that case that there could be a recovery for the "mental anguish and suffering of the parents"; but we have been referred to no other case that holds such doctrine. Certainly it was not so held in the Beeson case. But entirely contrary views were expressed in the latest decision of this court on the subject. (*Munro v. Dredging Co.*, 84 Cal. 515; 18 Am. St. Rep. 248.) In that case,—which was for the death of an adult son,—the lower court had instructed that the jury in estimating the damages might consider "the sorrow, grief, and mental suffering occasioned by his death to his

mother"; and this court held the instruction erroneous, and for that reason reversed the judgment, the court holding that such a rule would afford an "opportunity to run into wild and excessive verdicts." The court said: "We are of opinion that the court erred in including in the instruction the words 'sorrow, grief, and mental suffering occasioned by the death of his son to his mother.' In thus directing the jury the court fell into error. In our opinion, the damage should have been confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of the deceased. . . . We have found no case in which damages for sorrow, grief, and mental suffering are allowed under any of the statutes." And further, that the statutory action is a new one, "and not the transfer of the representatives of the right of action which the deceased person would have had if he had survived the injury." The case was decided in Bank. Justice Thornton delivered the opinion, which was concurred in by two other justices, and a fourth justice concurred in the judgment, and must therefore have concurred in the one main reason for which the judgment was reversed; he may not have been ready to say that the "comfort and society" of the deceased could be considered. There was only one dissent, but upon what ground does not appear. We think, therefore, that the case is full authority on the main point. At all events, we think that the opinion states the general propositions of law governing the case correctly; although as to one matter it may be misunderstood. The language, "the loss of the comfort, society, support, and protection of the deceased," must be held as having been used within the meaning given to it in *Beeson v. G. M. G. M. Co.*, 57 Cal. 20, as hereinbefore stated,—that is, with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death. The said language would not be correct in any other sense. But in the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given

wide range to run into any wild and excessive verdict which their caprice might suggest.

We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred.

There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of defendant; and plaintiff is not appealing.

The judgment and order appealed from are reversed, and a new trial ordered.

SHARPSTEIN, J., concurred.

DE HAVEN, J., concurring.—I concur in the judgment. The measure of damages in actions by a parent for the death of a child, when the facts are not such as to warrant exemplary damages, is correctly stated in section 763 of *Shearman and Redfield on Negligence*, as follows: "The damages recoverable by a husband, parent, or master for a negligent injury to the person of his wife, child, or servant are strictly limited to an amount fully compensatory for the consequent loss of service, for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like."

The sixth instruction given upon the request of plaintiff, to the effect that "in estimating the damage sustained by her the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child, but such damages may be given as under all the circumstances of the case may be just," is contrary to this rule, and was erroneous. The object of section 376 of the Code of Civil Procedure is not to give redress or compensation for the mental distress of a mother, consequent upon the death of her child. The general language of

section 377 of the Code of Civil Procedure, that in actions of this character, "such damages may be given as under all the circumstances of the case may be just," is used with reference to the fact that the damages which are allowed to be recovered by sections 376 and 377 of the Code of Civil Procedure are, with the exception of the expenses incurred by the plaintiff in consequence of the injury resulting in the death for which they are claimed, prospective in their nature, relating as they do to the loss of future service, and necessarily based upon probabilities, and upon data which in many respects are uncertain, and therefore the estimate of such damages must necessarily call for the exercise of a very large discretion upon the part of the jury; and all that is meant by the language quoted is, that the jury shall, in view of all the circumstances of the case, and considering also the age and the ability of the deceased to serve the relative for whose benefit the action is brought, give such damages as they shall deem just, keeping in view that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.

Hearing in Bank denied.

[No. 14670. Department Two. — August 5, 1892.]

**BERNARD S. BLONDEAU, APPELLANT, v. FRANCES
SNYDER ET AL., RESPONDENTS.**

FORECLOSURE OF MORTGAGE — DEFAULT JUDGMENT AGAINST SUBSEQUENT PURCHASER — INSUFFICIENT PLEADING — VALIDITY OF JUDGMENT — LIMITATION OF ATTACK — STRIKING OUT. — In an action for the foreclosure of a mortgage against the mortgagor and a subsequent purchaser of the mortgaged property, where the prayer of the complaint was for a foreclosure of the mortgage and a sale of the property, and that the proceeds be applied to the payment of the money due thereunder and for costs, and asked for a deficiency judgment, and the summons followed the prayer of the complaint, and gave notice that the action was brought to obtain a decree of foreclosure of the mortgage and for a sale of the premises, and if the proceeds of the sale were insufficient, to obtain a judgment against the defendants for the balance due, and that upon their default the plaintiff would apply to the court for the relief de-

manded, and the action was dismissed as to the mortgagor, and a default judgment rendered against the subsequent purchaser for the amount due under the mortgage, such judgment is not void, although the complaint did not state facts showing any personal liability upon the part of the subsequent purchaser; but the error is one which should have been corrected upon appeal, or upon a proper showing by motion made within the time limited by section 473 of the Code of Civil Procedure, and cannot be stricken out after the lapse of the time.

APPEAL from an order striking out parts of a default judgment.

The facts are stated in the opinion of the court.

Hendrick & Younkin, and *T. J. Capps*, for Appellant.

Wellborn, Stevens & Wellborn, for Respondents.

DE HAVEN, J.—Appeal from an order made May 15, 1891, striking out certain portions of a judgment rendered November 14, 1888. The defendants were personally served with summons in the action in which the judgment was rendered. The action was one for the foreclosure of a mortgage executed by one B. F. Snyder in his lifetime, and it was alleged in the complaint that Snyder in his lifetime “conveyed the real estate specified in said mortgage to one Rosa A. Woodford, subject to said mortgage, who is now the legal owner of said real property.”

The prayer of the complaint was, that the mortgage be foreclosed and the real estate sold, “and the proceeds applied to the payment of said sums of money and costs of this action, and that the said plaintiff may have judgment and execution against the said defendants for any deficiency,” etc. The summons followed the prayer of the complaint, and gave notice that the action was brought to obtain a decree of foreclosure of the mortgage and for a sale of the premises, and if the proceeds of the sale were insufficient, to obtain a judgment against the defendant Snyder “and Rosa A. Woodford for the balance remaining due,” etc., and that upon their default the plaintiff would apply to the court for the relief demanded.

The action was dismissed as to defendant Snyder, and and the defendant Woodford did not appear, and her default was entered. The court, in its decree, found "that there is now due and owing to the plaintiff, . . . from the defendant Rosa A. Woodford, upon the promissory notes and for money expended under the terms of said mortgage, as set forth and described in plaintiff's complaint, the sum of \$2,116.65, and that the defendant Rosa A. Woodford is liable for the amount thereof."

This portion of the judgment was stricken out by the order appealed from, and it is claimed by respondent that as the complaint did not state any facts showing a personal liability upon the part of Rosa A. Woodford for the payment of said notes, that the court was without jurisdiction to find such liability by its judgment, and that the judgment was and is in this respect absolutely void.

This contention cannot be sustained. The judgment in this respect was within the relief demanded in the complaint and specified in the summons, and the court had jurisdiction, and indeed was required, to determine in that action whether upon the facts alleged the plaintiff therein was entitled to the relief which he demanded in his complaint. The court undoubtedly committed an error in finding such personal liability, but its judgment was not for this reason void.

The error could have been corrected upon appeal from the judgment, or upon a proper showing by motion, if it had been made within the time limited by section 473 of the Code of Civil Procedure; but it is now too late to do so by motion.

The entry in the judgment docket as to the defendant Snyder was unauthorized, and as to her the order will be affirmed. As to the defendant Rosa A. Woodford the order appealed from is reversed.

McFARLAND, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 14599. Department Two. — August 5, 1892.]

A. BLANC, RESPONDENT, v. THE PAYMASTER MINING COMPANY, APPELLANT.

PARTIES — FRAUDULENT GRANTOR PROPER BUT NOT NECESSARY PARTY. —

While a fraudulent grantor is a proper party defendant in an action to subject to a lien of a judgment the property alleged to have been fraudulently conveyed, he is not a necessary party.

ASSUMPSIT AGAINST FOREIGN CORPORATION — ATTACHMENT — JUDGMENT

IN REM — JURISDICTION. — In an action of *assumpsit* against a foreign corporation, which has no managing agent or other officer in this state upon whom service of summons can be made, the only valid judgment which can be rendered is one in the nature of a judgment *in rem* against such property as was seized under a writ of attachment therein. The fact that a judgment in such action is general in its terms for the recovery of money only, and makes no reference to the fact that any property has been attached therein, does not render it void, if in fact such attachment was made; but if no property was attached in the action, the court is without jurisdiction to render any judgment which can be enforced against the property of the defendant.

ID. — RETURN UPON ATTACHMENT — INCONCLUSIVENESS — SUBSEQUENT ACTION AGAINST SUCCESSOR OF CORPORATION. — The return upon the writ of attachment is not conclusive of the validity of the attachment in a subsequent action against the successor of the corporation defendant.

ID. — SERVICE OF SUMMONS — MANAGING AGENT — CLERK OF FOREIGN CORPORATION — CASHIER — CONSTRUCTION OF CODE. — A person employed by a foreign mining corporation as a clerk in a store belonging to it is not the managing agent or cashier of the corporation upon whom summons may be served, within the meaning of section 542 of the Code of Civil Procedure, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in a mine belonging to the corporation from data furnished him by the superintendent, and to pay them. The word "cashier" in such section refers to an executive officer of a corporation, — as the cashier of a bank — and not to a simple employee who is not a managing agent.

FRAUDULENT CONVEYANCE — ACTION BY CREDITOR — NECESSITY OF JUDGMENT — EXCEPTIONS TO RULE — TRANSFER OF PROPERTY OF INSOLVENT CORPORATION. — Though, as a general rule, a creditor must have first recovered judgment against his debtor, and have execution returned unsatisfied, before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor, yet this rule has exceptions, and does not apply to a case of a transfer of all the property of an insolvent corporation, without consideration, to a new corporation, through the fraud of the managing agent of the insolvent corporation, as part of a scheme to cheat and defraud the creditors and other stockholders of the insolvent corporation.

ID. — NEW CORPORATION CONTINUATION OF OLD — LIABILITY FOR INDEBTEDNESS WITHOUT JUDGMENT. — In such case, the new corporation will be regarded in a court of equity as a continuation of the former one, and will be held liable for the indebtedness of such former one to the extent

of the value of the property received without consideration from it, although there has been no valid judgment against the former corporation for the amount of the claim, and therefore no return of execution unsatisfied.

WAIVER OF FINDINGS — IMPLIED FINDINGS — APPEAL — PRESUMPTION — REVIEW OF EVIDENCE. — Although there are no express findings, and it appears from the record upon appeal that findings were waived, still it will be presumed that the court found all the matters of fact in issue and necessary to support its judgment in favor of the successful party. Such findings are implied; and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Harris & Gregg, for Appellant.

The judgment against the Esperanza Company, without proper service of process in this state, was void as a judgment *in personam*. (*Pennoyer v. Neff*, 95 U. S. 714; *Cooper v. Reynolds*, 77 U. S. 931; *Belcher v. Chambers*, 53 Cal. 635; *Grover and Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287.) The return of the sheriff does not show that he had been able to find any property upon which to levy an attachment, and therefore the court could not tell whether it had any jurisdiction to render any judgment of any character. (*Pennoyer v. Neff*, 95 U. S. 714; *Belcher v. Chambers*, 53 Cal. 635.) The jurisdiction should be affirmatively shown. (*Reinhart v. Lugo*, 86 Cal. 399; 21 Am. St. Rep. 52.)

Hunsaker, Britt & Goodrich, and *J. E. Wadham*, for Respondent.

The Esperanza Company is not a necessary party to the action, because the transfer by it of the property to the defendant is good as between the parties to the transfer (*Hills v. Sherwood*, 48 Cal. 386.); and the Paymaster Company is the only person having any interest to defend the suit. (*Fox v. Moyer*, 54 N. Y. 130, 131;

Buffington v. Harvey, 95 U. S. 103; *Potter v. Phillips*, 44 Iowa, 353; *Dunn v. Wolf*, 47 N. W. Rep. 887 (Iowa); *Coffey v. Norwood*, 81 Ala. 512; *Dailey v. Kinsler*, 47 N. W. Rep. 1045 (Neb.); *Smith v. Grim*, 26 Pa. St. 95; 67 Am. Dec. 400.) The recital in the judgment of due service of process is conclusive in this action. (*Reily v. Lancaster*, 39 Cal. 354; *McCauley v. Fulton*, 44 Cal. 361; *Ex parte Sternes*, 77 Cal. 163; 11 Am. St. Rep. 251; *People v. Harrison*, 84 Cal. 609, 610; 1 Freeman on Judgments, 4th ed., sec. 131, and cases cited.) The proceeding in the case of *Blanc v. The Esperanza Company* became a proceeding *in rem* as to the property attached. (*Anderson v. Goff*, 72 Cal. 65, 69-72; 1 Am. St. Rep. 34; *Brown v. Tucker*, 7 Col. 37; *Freeman v. Alderson*, 119 U. S. 187.) But whether the judgment against the Esperanza Company is valid or not, the Paymaster Company is liable directly to the plaintiff to the extent of the property received by it, and the plaintiff is entitled to maintain this action to subject the property to sale for the payment of his debt, without having first proceeded to judgment against the Esperanza Company, although, as a matter of precaution, he has adopted the latter course. (Civ. Code, secs. 2224, 2243; *San Francisco and North Pacific R. R. Co. v. Bee*, 48 Cal. 398; 2 Morawetz on Corporations, sec. 791; *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.* 13 Fed. Rep. 516; 10 Fed. Rep. 596; 1 Jones on Liens, sec. 84-86; *Case v. Beauregard*, 101 U. S. 690, 691.) The appellant cannot be heard upon the appeal from the order denying the motion for a new trial, as findings having been waived, there is no decision to which the motion and specifications of insufficiency can relate. A new trial cannot be granted for insufficiency of the evidence to justify the judgment. (*Coveny v. Hale*, 49 Cal. 552; *Martin v. Matfield*, 49 Cal. 42; *Little v. Jacks*, 67 Cal. 165; *Sawyer v. Sargent*, 65 Cal. 259.) A contrary practice may have been recognized when the system of "implied findings" prevailed. (*Steinback v. Krone*, 36 Cal. 303.) But that system is now abolished. (*Dowd v. Clarke*, 51 Cal. 263.)

DE HAVEN, J.—The complaint in this action alleges, in substance, among other matters, that the Esperanza Company, a foreign corporation doing business in Arizona, became in February, 1884, indebted to plaintiff upon two promissory notes, one for the sum of one thousand dollars payable on demand, and the other for the sum of five thousand dollars payable February 12, 1885; that thereafter the said Esperanza Company became indebted to its various stockholders, and a pretended assignment was made of all its property to its "acting managing officer and agent," one Blaisdell, for the alleged purpose of paying the debts of such corporation, and the said Blaisdell made a pretended sale of such property at public auction, at which sale "he claims to have become the purchaser of the tools, machinery, stamp-mills, engines, and boilers belonging to the said Esperanza Company, all of the value of seventy-five thousand dollars, at a purely nominal sum, to wit, the sum of fifty dollars"; and thereupon said Blaisdell, "together with the principal officers, agents, and stockholders of the said Esperanza Company, proceeded to organize the defendant," and turned over to it all of the said property, for the purpose of cheating and defrauding plaintiff and other creditors of the Esperanza Company; and in this connection, the complaint further charges "that the said the Paymaster Mining Company, defendant, was so organized by the said Blaisdell, the officers and agents and stockholders of the said Esperanza Company, with the view of taking and receiving said property as a part of said plan for defrauding the creditors of the Esperanza Company, and particularly the plaintiff," and that said defendant never paid any consideration whatever for said property. It is also alleged that the Esperanza Company having failed, and refused "to pay the just demands of this plaintiff," he instituted a suit against said company in one of the superior courts of this state "for the collection of the said sum of six thousand dollars," and interest, and a writ of attachment was issued therein and the property before referred to was attached, etc.,

and judgment was duly given in his favor, and against said Esperanza Company, for the sum of \$7,784.74 and costs, and that nothing whatever has been paid on said judgment. The prayer of the complaint is, "that the pretended sales of the said Blaisdell to the defendant be declared void," and "that it be adjudged . . . that the said defendant holds the said property charged with the payment of the plaintiff's claim of \$7,784.74, with interest and costs," and that the same be sold to satisfy the same, and for general relief. To this complaint the defendant interposed a demurrer, upon the general ground of insufficiency of the alleged facts to constitute a cause of action, and upon the further ground that there is a defect of parties defendant, because of the failure to make the Esperanza Company and Blaisdell defendants. The demurrer was overruled. Upon the trial findings were waived, and a judgment rendered in favor of plaintiff in accordance with the prayer of the complaint. The defendant appeals.

It is argued by the appellant here that the court erred in its ruling upon the demurrer to the complaint; and also that certain implied findings are not justified by the evidence.

1. The demurrer to the complaint was properly overruled. The complaint states a cause of action, and the Esperanza Company and Blaisdell were not necessary parties to the action. Upon the facts alleged in the complaint, neither of them has any interest, either legal or equitable, in the property, and neither could be prejudiced by the judgment which the plaintiff seeks to obtain; and the omission to make them defendants did not in any manner preclude the defendant from interposing any defense which it may have had to the matters alleged in the complaint, and therefore it cannot complain that they were not made parties defendant. (*Fry v. Moyer*, 54 N. Y. 130; *Potter v. Phillips*, 44 Iowa, 353; *Coffey v. Norwood*, 81 Ala. 512.)

In *Potter v. Phillips*, 44 Iowa, 353, the court, in answer to the objection that the fraudulent grantor was not

made a party defendant in an action to subject to the lien of plaintiff's judgment the property alleged to have been fraudulently conveyed, say: "Whilst a proper party, we do not see wherein he can be regarded as a necessary party. Whether the conveyances were fraudulent or in good faith, the property has irrevocably passed beyond his control. In no way can he be prejudiced, in a legal sense, by a determination which subjects the property to the payment of his debts."

And in *Coffey v. Norwood*, 81 Ala. 512, the supreme court of Alabama reach the same conclusion, saying: "Neither the debtor if living, nor if he be dead his personal representatives, can enjoy any of the fruits of a successful prosecution of the suit to set aside the fraudulent conveyance; for after the complaining creditor's demand is satisfied, the remainder of the fund goes to the fraudulent grantee. The debtor, therefore, has no interest, legal or beneficial, either in the property sought to be subjected or in the litigation having reference to it, except remotely or indirectly. Nor can the grantee be prejudiced in any manner by omitting to join the grantor, or his personal representative, as he can make any defense to the complaint's demands which the grantor or personal representative could do if he were a party to the suit."

2. The appellant contends that the evidence does not justify the implied finding of the court, that in the action of the plaintiff against the Esperanza Company mentioned in the complaint, an attachment was levied upon the property sought to be reached by this action, and that the evidence is also insufficient to justify the further implied finding that in the action referred to a judgment was rendered in favor of this plaintiff, and against the Esperanza Company, for the sum of \$7,784.74.

It is claimed by respondent that inasmuch as findings were waived, and none are to be found in the record, there are no findings to which exception can be taken, and nothing to which appellant's specifications of insufficiency of evidence can relate. We do not think this is a

correct view of the law upon this point. There are no express findings in the record, but it is the presumption of law that the court found all the matters of fact in issue, and necessary to support its judgment in favor of the successful party. Such findings are implied, and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding. The action of the appellant in thus excepting to the implied findings was proper.

3. The Esperanza Company is a foreign corporation, and had no managing agent or other officer in this state upon whom service of summons was or might have been made in the action which plaintiff brought against it to recover the amount due upon the notes referred to in the complaint. This being so, the only valid judgment which could have been rendered in that action was one in the nature of a judgment *in rem*, against such property as may have been seized under the writ of attachment therein. (*Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Pennoyer v. Neff*, 95 U. S. 714; *Cooper v. Reynolds*, 10 Wall. 308.) The judgment rendered in that action was a general one, for the recovery of money only, and made no reference to the fact that any property had been attached therein; but it was not for this reason void, if, in fact, such attachment was made. In such case the judgment would be held to have the effect of perpetuating the attachment lien, and would be regarded as "so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and considered for that purpose and to that extent is not void." (*Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Cooper v. Reynolds*, 10 Wall. 308.) It follows necessarily, from this view of the law, that in considering whether the court below was justified in finding that plaintiff recovered against the Esperanza Company the judgment alleged in the complaint, it must be first determined whether the evidence is sufficient to sustain its other

implied finding that the property in controversy here was attached in that action. If such property was not attached, then, under the law as above stated, the court was without jurisdiction to pronounce any judgment in that action which can be enforced against such property. It is shown that the writ of attachment was issued in the action referred to, and it further appears, from the return of the officer in whose hands it was placed for service, that he attached all property "in the possession and under the control of the Paymaster Mining Company, by delivering to and leaving with Cyrus Wheeler, the acting managing agent of said Paymaster Mining Company, personally," a copy of said attachment, etc.

This return is not conclusive in this action. The Paymaster Mining Company was in possession of the property involved in this action, and assuming that it was not capable of being taken into manual possession, then, under subdivision 5 of section 542 of the Code of Civil Procedure, in order to effect its attachment, it was necessary to serve a copy of the writ of attachment, and a notice that the property was attached in pursuance thereof, upon the president, or other head of that corporation, or its secretary cashier, or other managing agent thereof. (*Kennedy v. Hibernia S. & L. Soc.*, 38 Cal. 151.) It is not claimed that Wheeler, upon whom the writ of attachment was served in plaintiff's action against the Esperanza Company, was the president or secretary of the Paymaster Mining Company, and the evidence does not show that he was a managing agent thereof. On the contrary, it appears that he was only employed by that corporation in the capacity of a clerk in a store belonging to it, and although he had the custody of money belonging to the corporation, and it was a part of his duty to keep the accounts of the men employed in the mine from data furnished him by the superintendent, and to pay them, this did not constitute him the "cashier" of the corporation, as that word is employed in section 542 of the Code of Civil Procedure, or a managing agent of such corporation. The word "cashier" in that section refers

to an executive officer of a corporation,—as the cashier of a bank,—and not to a simple employee, who is not a managing agent of the corporation.

Upon the evidence, we think it must be held that in the action referred to there never was any valid attachment of the property of the Esperanza Company, and as it was not personally served with summons in this state, the judgment alleged in this complaint to have been recovered by plaintiff against that corporation was void. The implied finding of the court, therefore, that such judgment is valid and is a lien upon the property in controversy, is not sustained by the evidence.

4. The remaining question to be considered is, whether, in view of the other allegations of the complaint, and found by the court to be true, the plaintiff is entitled to the relief which he asks, notwithstanding his failure to obtain a valid judgment against the Esperanza Company for the amount of the claim which he holds against that corporation. The general rule (to which, however, there are some exceptions) is, that a creditor must first have recovered judgment against his debtor, and execution thereon be returned unsatisfied, before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor. (3 Pomeroy's Eq. Jur., sec. 1415; Bump on Fraudulent Conveyances, p. 522.) And this general rule is embodied in section 3441 of the Civil Code, which declares: "A creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his rights to take the property affected by the transfer or obligation."

It is claimed by the appellant that the present case falls within this rule, and that as plaintiff has never recovered a valid judgment against the Esperanza Company, the foundation of his right to maintain this action is gone. But we are unable to agree to this proposition.

As already stated, the complaint charges that the Esperanza Company is wholly insolvent, and that defendant is now in possession of all of its property, without having paid any consideration therefor, claiming to own

the same by virtue of the fraudulent transfers before mentioned, and that the defendant was organized by the officers and stockholders of the Esperanza Company for the purpose of taking and holding its property, and as part of a scheme to defraud and cheat the plaintiff and other stockholders of the Esperanza Company. These facts are all clearly alleged, and we think, as against a general demurrer and after judgment, the complaint may also be regarded as sufficiently averring that the notes executed to plaintiff by the Esperanza Company, as evidence of its indebtedness to him, are still unpaid. These are all material allegations, and upon his record, express findings having been waived, it must be presumed that they were all found to be true by the court below.

We think, upon this state of facts, a court of equity will regard the defendant as a mere continuation of the former corporation under a different name, and will hold it liable for the indebtedness of the Esperanza Company, at least to the extent of the value of the property which it received from it without consideration, and under the circumstances stated. Nominally, the two corporations may be different, but as viewed in equity, they are the same, and the plaintiff is not prevented from asserting such identity in fact. This was so, substantially, held in the case of *Hibernia Insurance Company v. Transportation Company*, 13 Fed. Rep. 516. In that case, upon a state of facts similar to that disclosed by this record, McCrary, circuit judge, after referring to the fact that it was doubtful whether any service of process could be made upon the old company so as to secure a judgment at law against it, proceeded to say: "A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of

the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process of law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts."

Treat, district judge, in a concurring opinion in that case, said: "A mere change of name cannot avoid obligations. The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones,—was, in short, the old corporation,—and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be so? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent,—that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations."

The principle of this decision, which we regard as eminently just, was also approved by the supreme court of Pennsylvania in *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585.

It follows, from these views, that plaintiff is entitled to satisfy the demand against the Esperanza Company out of its property now held by the defendant, and that, too, without first recovering a nominal judgment against the Esperanza Company.

The complaint does not allege the rate of interest the notes there referred to bear, but the court recites in its judgment that such rate is eight per cent per annum. But the judgment does not declare that the amount unpaid on such notes is a lien upon the property in controversy, but that the judgment referred to in the com-

plaint constitutes such a lien, and directs a sale of the property to satisfy the same. The amount of this judgment, including, as it does, costs of the former action and interest upon the interest which had accrued upon said notes at the date of its rendition, exceeds the amount of the principal and interest of said notes, and is therefore erroneous. The court should ascertain the amount due upon the notes, and direct a sale of so much of the property in controversy as may be necessary to pay the same, and costs of the action and of making the sale.

Judgment and order reversed, with directions to the superior court to find the amount due the plaintiff from the Esperanza Company upon the notes referred to in the complaint, and thereupon to render judgment in accordance with this opinion.

McFARLAND, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 14663. Department One. — August 6, 1892.]

AMOS E. JEFFERSON ET AL., APPELLANTS, v. R. E.
HEWITT ET AL., RESPONDENTS.

CORPORATIONS — SUBSCRIPTION TO STOCK — STATEMENTS CONCERNING FUTURE EVENT — MATTERS OF OPINION. — Statements concerning the happening of a future event, being necessarily matters of opinion merely, cannot be relied upon to avoid subscriptions obtained by an agent of a corporation for shares of its capital stock.

1D. — SUBSCRIPTION FOR RAILROAD SHARES — INCORRECT STATEMENTS AS TO TIME OF COMPLETION OF ROAD — DEFENSE TO NOTE. — Statements made by an agent obtaining subscriptions for shares in a railroad company, to the effect that the railroad would be completed within a certain time and would be built upon a certain route, do not render a subscription made upon the faith of them voidable, or constitute a defense to a note given for such subscription, although the road be not built upon the route or within the time indicated.

1D. — CONDITIONAL SUBSCRIPTION. — In order that delay in completion of the road may be available as a defense to a promissory note given upon a subscription for shares, the time of completion must be shown to have been a condition agreed upon by the parties as a term of the subscription.

APPEAL from a judgment of the Superior Court of Orange County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

C. C. Hamilton, and Houghton, Silent & Campbell, for Appellants.

Ray Billingsley, and James G. Scarborough, for Respondents.

PATERSON, J.—On July 14, 1888, the defendants executed and delivered to the Santa Ana Fair View and Pacific Railroad Company their non-negotiable note for the sum of five thousand dollars, payable four months after date, which was assigned to the Fair View Development Company, and by the last-named company assigned to these appellants.

The court found that the note was given for fifty shares of the capital stock of the company first above named, but that it was made and delivered "upon the sole consideration and inducement of the promise and assurance of said company that it would complete its railroad from Fair View to the Pacific Ocean before the maturity of said promise in writing, to wit, within sixty or ninety days from said date; that the said company failed to complete its railroads, or any part thereof, . . . within the said time, . . . and that no part of said railroad between said last-named points has at any time been commenced and constructed or completed; that by reason of such failure, the consideration of defendants' agreement to take said stock, and of their promise in writing set out in the complaint, has wholly failed"; but that the note "was not delivered upon the *express condition* that the railroad . . . would be completed . . . within sixty or ninety days from its date, nor upon condition that if said road was not so completed defendants would not have to pay said instrument, or any part thereof." The court further found that the defendants notified the company of their failure to

complete the road within the time specified, demanded the return of their note, and afterwards, on answering herein, brought the certificate of stock into court, and deposited it with the clerk for the plaintiffs.

The defendant R. E. Hewitt testified that on July, 10, 1888, Dr. Bailey stated to him that he was a stockholder, secretary, and director in the railroad company, and that there was a limited amount of the capital stock not sold, "less than fifteen thousand dollars of the original sixty-thousand-dollar issue, and that he was authorized to dispose of part of this to his friends"; that the company was going to increase the stock to two hundred thousand or three hundred thousand dollars, and place it on the market at once; "that the railroad was going right on from Fair View to the beach within sixty or ninety days at the farthest, and that he would take the stock if he could; that he held now a large amount of stock in the company"; that on the 13th the doctor came to his house and said that "the engine and rolling stock of the company was paid for, but that the road was not doing much now, more than paying expenses, but that it would be on a good, paying basis as soon as it was extended to the beach, and that everything was ready to do this"; that on the 14th the doctor said he could rely implicitly upon his statements *as a friend*; that he would not make them unless they were true; and from his position in the company, he knew that if defendants did not take the stock they would regret it; that the doctor insisted upon his taking fifty shares or more; that witness said to him he did not have the faith in this enterprise that the doctor had, and unless the road was completed to the beach he would not have the stock as a gift.

The findings of the court show that the statements of Dr. Bailey, testified to by the defendant, were made without any fraudulent purpose; that the defendants were prevented from making any investigation by reason of the statement of the doctor that he was the secretary and director of the company, and owned a large amount of

stock therein, and from his position in the company he knew his statements were true, and that defendants could rely upon them; that the defendants believed the statements made by Bailey, and, relying upon them, were induced to make the note and agree to take fifty shares of the capital stock of the company.

We do not think that the facts shown by the record and found by the court constitute any defense to the action. The rule is well settled that statements concerning the happening of a future event cannot be relied upon to avoid subscriptions obtained by an agent of a corporation. Relating as they do to the probability or improbability of the happening of a future event, they must necessarily be matters of opinion merely. Morawetz states the proposition thus: "A statement made by an agent obtaining subscriptions for shares in a railroad company, to the effect that the proposed road would be built upon a certain route or within a certain period of time, would not render a subscription made upon the faith of it voidable, though the statement be made with the intention to deceive, and the road be not built upon the route or within the time indicated." (1 Morawetz on Private Corporations, sec. 98.) And a large number of cases are cited in support of the text. (See also Thompson on Stock, sec. 121.) It is unnecessary for us to indorse the rule thus stated to its full extent, because, as we have seen, the court expressly found that the representations of Dr. Bailey were not fraudulent.

The construction of the road to the ocean was no part of the consideration of the note; the findings negative the averment of the answer that the note was given "upon the express condition" that the railroad should be completed within ninety days. The matters relied upon, to be available as a defense, must be shown to have been a condition agreed upon by the parties. There is nothing in the cases cited by respondent inconsistent with the views we have expressed.

The fair import of the testimony is, that the representations referred to were the mere confident *expression of*

opinion of one member of the board of directors that the road would be completed within ninety days, and that the defendants, placing confidence in that opinion, executed the note in suit.

The judgment and order are reversed, and the cause is remanded for a new trial.

HARRISON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

[No. 14782. Department One. — August 8, 1892.]

U. D. SWITZER, APPELLANT, v. A. F. BAKER, RESPONDENT.

GUARANTY — ASSURANCE BY LESSOR TO EMPLOYEE OF LESSEE. — A letter from the lessor of land to a party contemplating the rendition of services to the lessee, telling him to rest assured that he would get his pay for all work done, written in response to an inquiry from the party contemplating the services as to whether he would be paid for his work, does not amount to a guaranty.

DO. — AGREEMENT TO PAY DEBT OF ANOTHER — AMBIGUOUS LANGUAGE. — An agreement to pay the debt of another cannot be inferred from doubtful language, which although it might be capable of being construed as a guaranty, does not exclude an inference equally reasonable that it was only intended to express confidence in the financial ability and integrity of the debtor.

APPEAL from a judgment of the Superior Court of Tulare County.

The facts are stated in the opinion.

N. O. Bradley, for Appellant.

The letter written by the defendant amounted to a guaranty. (*Morse v. Holt*, 10 Gratt. 284; *Birdsall v. Heacock*, 32 Ohio St. 177; 30 Am. Rep. 572.)

George B. Graham, for Respondent.

The letter did not constitute a contract of guaranty. (Civ. Code, sec. 2787.)

TEMPLE, C. — This appeal is from a judgment upon demurrer, plaintiff declining to amend.

The action is to recover value of service for harvesting a crop of grain; and it is averred that defendant owned the land upon which the grain was raised, and had leased it to one Traver, who cultivated and put in the grain; that defendant owned an interest in the crop.

The complaint then proceeds as follows: "That on or about the ninth day of June, 1889, said A. Traver spoke to this plaintiff about heading said crop of grain, and plaintiff, being unacquainted with said Traver, and not knowing anything about his financial standing, wrote to said defendant, in effect, that said Traver desired this plaintiff to head said crop of grain, and inquiring of defendant as to whether he, plaintiff, would be paid for his work if he cut said grain, and thereupon, in due course of mail, plaintiff received an answer from defendant, of which the following is a true copy:—

"FRESNO, CAL., June 17, 1889.

"MR. DAN SWITZER: Your letter received to-day. You may rest assured that you will get your pay for all work done. Yours truly, A. F. BAKER."

It is also charged that the labor was reasonably worth the sum of \$900, \$250 of which was paid by defendant, leaving still unpaid \$650; that Traver was at the time, and ever since has been, wholly insolvent.

The demurrer is general, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

The plaintiff must base his claim solely upon the proposition that Baker's letter in reply to his inquiries amounted to a guaranty. Whether it does or not must depend upon the contents of the letter to which it was a response. The letter is not given even in substance, but in effect is said to be that, uncertain of Traver's financial standing, he wrote, informing defendant that Traver desired him to cut the grain, and inquiring as to "whether he, plaintiff, would be paid for his work if he cut said

grain." The reply was simply a very positive assurance that he would get his pay.

The suit assumes a contract on the part of defendant to pay,—to become responsible for Traver's liability. There is here, however, only an assurance that if he worked for Traver he would get his pay; and this, in response to inquiries in regard to Traver's financial standing. Any one who has full confidence in the financial ability and the integrity of Traver would have answered in the same way.

Even if the language used be capable of a different construction, still it does not exclude the inference above drawn, which is at least equally reasonable. We cannot infer an agreement to pay the debt of another from such doubtful language. It was incumbent upon the pleader to make out his case affirmatively, and we must assume that he has stated the facts as favorably as possible.

We advise an affirmance of the judgment.

BELCHER, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

[No. 14443. Department Two. — August 6, 1892.]

JEROME CHURCHILL, APPELLANT, v. H. BAUMANN ET AL., RESPONDENTS.

DIVERSION OF WATER — PARTICIPATION OF PLAINTIFF AS TENANT IN COMMON — PLEADING — DENIAL OF INJURY — ESTOPPEL. — In an action to recover damages for alleged diversion of water by means of a dam constructed by the defendants, it may be shown as a defense, under the denial of injury to the plaintiff, that the plaintiff participated with the defendants in the maintenance of the dam and diversion of the water, as a tenant in common with the defendants; and it is not necessary specially to plead such fact as an estoppel. (By Sharpstein, J., and McFarland, J.)

CONSENT TO INJURY. — One who consents to an act which occasions him loss is not wronged by it.

PLEADING — ANSWER — NEW MATTER. — Any matter which does not dis-

charge or avoid a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist, and that material allegations of the complaint are not true, is not new matter such as is required to be specially pleaded.

Id. — DENIAL BY AFFIRMATIVE ALLEGATION? — FINDING. — An issue may be taken upon a material allegation of the complaint by an affirmative allegation in the answer inconsistent with it; and a finding of affirmative facts which are inconsistent with an averment which the answer denies is a sufficient finding that the averment is not true.

APPEAL from a judgment of the Superior Court of Modoc County.

The facts are stated in the opinion.

Spencer & Raker, and *C. A. Raker*, for Appellant.

J. D. Goodwin, *D. W. Jenks*, and *Jenks & Olafin*, for Respondents.

VANOLIEF, C. — This action was commenced on the first day of April, 1889, to recover eight thousand eight hundred dollars damages from the defendants — seven in number — for the alleged diversion of water from a natural stream — Pine Creek — in Modoc County, during the years 1887 and 1888, to the injury of plaintiff's riparian and appropriated water rights below the point of diversion; and also to enjoin such diversion *pendente lite*, and upon the hearing, perpetually.

Judgment passed for defendants, and plaintiff appeals from the judgment on the roll and without a bill of exceptions.

The court found that in the early part of spring the stream affords 3,000 inches of water under a four-inch pressure, but in the dryest part of the year only 1,000 inches; that in June, 1882, the defendants and one J. Thad. Jones constructed a dam across the creek above plaintiff's riparian lands, and above all the points from which plaintiff diverted water, by which they diverted from the creek 550 inches of water into a ditch constructed by them, through which they conducted that amount of water to certain lateral ditches connected therewith, through which the water in the main ditch

was distributed among the owners in proportion to the quantity of land to be irrigated thereby, viz., 50 inches of water to 160 acres of land. None of the land irrigated by this water was riparian to the stream. J. Thad. Jones owned 160 acres of land, and was entitled to use, and did use, 50 inches of water from the main ditch to irrigate his land until October, 1885, when he conveyed his land and water right to the plaintiff; "that after said J. Thad. Jones conveyed said land to the plaintiff, and particularly during the years 1886 and 1887, plaintiff participated with and assisted the defendants in maintaining said dam, and in keeping said dam and ditch in repair, and acted in connection with them in diverting said amount of 550 inches of water from said stream by means thereof; and plaintiff, during the irrigating seasons of said years 1886 and 1887, did use the water so diverted from Pine Creek by means of said dam and ditch for irrigation upon said land (purchased from Jones), to the extent and amount theretofore claimed and used upon said land by his grantor, J. Thad. Jones."

It was further found that plaintiff was in possession of all his riparian lands prior to 1882, and has been ever since; and that he had full notice of the construction of said dam, and of the diversion of 550 inches of water by the defendants and their grantors in June, 1882, and thence until October, 1885, when he purchased the interest of Jones, and during all that time had notice that defendants diverted the water under a claim of right; yet it does not appear that he ever objected to the construction of said dam, or the diversion of the water, until he did so by the commencement of this action.

As conclusions of law, the court found, among other things, that plaintiff is a tenant in common with the defendants in the dam, ditch, and water right; and that, by his participation and assistance in maintaining the dam and diverting the water, he is estopped from maintaining this action.

Counsel for appellant make the point that no estoppel was pleaded by defendants, and therefore the findings of

facts from which the conclusion of an estoppel is drawn are outside of the issues.

Conceding that there was no issue as to estoppel, it does not necessarily follow that the findings of fact from which the court drew the conclusion that plaintiff was estopped were not within other material issues; nor does it follow that those findings do not warrant the general conclusion of law, that plaintiff was not entitled to recover in this action. The facts found necessarily imply that from and after October, 1885, until after all the alleged injurious acts of the defendants had been done, the plaintiff consented to those acts; and consequently was not injured thereby,—*volenti non fit injuria*. In commenting upon this maxim, Mr. Broom says: "It is a general rule of the English law that no one can maintain an action for a wrong where he has consented to the act which occasions his loss" (Broom's Legal Maxims, side p. 265); and section 3515 of our Civil Code is to the same effect,—“He who consents to an act is not wronged by it.”

Says Judge Cooley: “Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife which he connived at or assented to. . . . But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds.” (Cooley on Torts, 2d ed., 187; *Crowin v. Railroad Co.*, 13 N. Y. 49; *Lyon v. Tallmadge*, 1 Johns. Ch. 187.)

It is alleged in the complaint that defendants forcibly and wrongfully diverted all the water from the creek during certain specified months in the years of 1887 and 1888, to the damage of the plaintiff in the sum of eight thousand eight hundred dollars.

The defendants denied that they ever diverted more than 550 inches of water, and on this issue the court

found in their favor. They further denied that by the diversion of the 550 inches the plaintiff was injured or damaged at all. Upon this issue they were entitled to prove the facts found, viz., that the plaintiff was interested with them in the dam and ditch, and for his own purposes co-operated with and assisted them in repairing and maintaining the same, and in diverting water from the creek, since he thereby necessarily consented to all the acts complained of. This was not such new matter as is required to be specially pleaded, since neither its purpose nor effect was to discharge or avoid a cause of action theretofore existing, but to prove that the alleged cause of action never did exist, by showing that the material allegation of injury and damage to plaintiff was not true. (Bliss on Code Pleading, secs. 352 et seq., and authorities cited.) An affirmative finding of facts inconsistent with an averment, and from which it necessarily follows that the averment is not true, is a sufficient finding that the averment is not true (*Coveny v. Hale*, 49 Cal. 552; *Water Co. v. Richardson*, 72 Cal. 598; *Miller v. Luco*, 80 Cal. 257); and it is well settled that an affirmative allegation may be traversed in pleading by an affirmative averment inconsistent with it. (*Miller v. Brigham*, 50 Cal. 615.) In the case at bar, however, the averment of injury to plaintiff was specifically denied, and the facts found, being wholly inconsistent, with the averment, are equivalent to a direct negative thereof, and are sufficient to support the judgment.

As there is nothing in the record tending to show that plaintiff withdrew his consent before the commencement of this action, the averment in the complaint, that defendants threaten and intend to continue the acts complained of, should not be construed to mean that they intend so to continue without his consent; but only that they intended to do as they had done theretofore, as found by the court. Therefore, conceding that plaintiff might have been entitled to an injunction, on the ground of mere threats, without any actual infringe-

ment of his right (as to which I express no opinion), there is no averment or finding that defendants have threatened or intend to divert water otherwise than they had done, viz., by plaintiff's assistance and consent. The finding of the court is, "that the defendants threaten and intend to continue to divert and use the waters of said stream, to the extent and in the manner hereinbefore found." And it is thereinbefore found, only, that the diversions complained of were made to the extent of 550 inches, and with the active co-operation and assistance of the plaintiff, and partly for his benefit. This finding, therefore, does not mean that the defendants threatened or intended to divert more than 550 inches, nor any quantity, without plaintiff's consent; and consequently does not show a threatened injury.

It is contended, however, that the finding that plaintiff assisted in repairing and maintaining the dam and ditch, and in diverting the water, etc., is inconsistent with another finding (24th), to the effect that "defendants and their associates" erected and maintained the dam and ditch, and diverted their several portions of water upon their respective tracts of land ever since the month of June, 1882.

But viewed in connection with the finding that J. Thad. Jones was one of the "associates" of defendants from June, 1882, until October, 1885, and that plaintiff succeeded Jones as an associate in October, 1885, the alleged inconsistency does not appear.

If the foregoing views of the case are correct, all other points urged by appellant are immaterial.

As to what may be the rights of the parties independently of plaintiff's consent to the acts complained of, it is not necessary nor intended to express or intimate an opinion.

I think the judgment is justified by the finding that the acts complained of were done with plaintiff's consent, and that it should be affirmed on that ground.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

SHARPSTEIN, J., McFARLAND, J.

DE HAVEN, J., concurring.—I concur in the judgment. The finding of the court below that plaintiff participated with defendants in the maintenance of the dam and diversion of the water of which he complains is a defense to the action. I do not, however, concur in so much of the foregoing opinion as holds that evidence tending to prove such defense was properly admitted under the denial that plaintiff sustained damage by reason of the matters alleged in his complaint. I think that such defense should have been specially set out in the answer. But this appeal is upon the judgment roll without any bill of exceptions, and upon this record the presumption is, that the evidence by which this defense was established was received without objection, and that the case was tried by consent of the parties, as if such defense had been specially alleged. This being so, appellant should not be permitted to urge here for the first time that no such issue was made in the court below. (*Horton v. Dominguez*, 68 Cal. 642.) The court below should have directed an amendment of the answer so as to conform to the proofs, but the judgment ought not to be reversed because such formal amendment was not made.

I do not understand that the case of *Ortega v. Cordero*, 88 Cal. 221, is necessarily opposed to these views. In that case the question was, what effect should be given to a finding which was inconsistent with a fact admitted by the pleadings, and it was in relation to this that the court said that there could be no presumption that the parties consented to treat admitted facts as in issue; that a judgment which was in conflict with a fact admitted upon the record could not be sustained, and that upon such a record there was no presumption that a party waived the benefit of an admitted fact. The question here is different. The finding which is claimed to be out-

side of the issues does not contradict any fact admitted upon the record, but simply avoids what would otherwise be the effect of matters alleged in the complaint and found by the court to be true. If the plaintiff made no objection to trying such an issue, the court committed no error in admitting the evidence to prove it. If, upon the other hand, such issue was tried, and evidence admitted against the objection of appellant, the fact should have been made to appear by a bill of exceptions. Error cannot be presumed for the purpose of reversing a judgment.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

[Nos. 14845 and 14846. In Bank. — August 6, 1892.]

COMBINATION LAND COMPANY, APPELLANT, v.
A. C. MORGAN, RESPONDENT.

ORDER DENYING NEW TRIAL — EFFECT OF NUNC PRO TUNC AMENDMENT — RELATION TO DATE OF ORDER — APPEAL. — A *nunc pro tunc* order of the trial court amending an order denying a new trial after the taking and perfecting of an appeal therefrom, by adding a recital to the effect that the motion for a new trial was based and submitted on a bill of exceptions filed at the date of the hearing of the motion, merely corrects the first order, and takes effect as of the date of the order corrected; and a contention that the last order superseded the first, and is the only order denying a new trial, which should have been appealed from instead of the first order, is untenable. In legal effect there was but one order.

NEW TRIAL — BILL OF EXCEPTIONS — SPECIFICATIONS — INSUFFICIENCY OF EVIDENCE — DECISION AGAINST LAW. — Where the specifications in a bill of exceptions used on a motion for a new trial include a double statement that the evidence is insufficient to justify the decision, and that the decision is against law in the particulars specified, the ambiguity is removed where the particulars stated show that the objection is to the insufficiency of the evidence.

VENDOR'S LIEN — BONA FIDE PURCHASER — NOTICE BEFORE PAYMENT. — In an action to foreclose a vendor's lien upon land, a defense of a second vendee, that he was a *bona fide* purchaser for value without notice, is not made out by proof that he purchased in good faith, without any previous

knowledge of the fact that his vendor had not fully paid the original vendor, but it is also necessary for him to show that he had paid for the land before he received notice of the original vendor's lien.

12. — NOTICE OF NON-PAYMENT BY VENDOR — EFFECT UPON SECOND VENDEE — DEDUCTION FROM PURCHASE PRICE. — Notice to a second vendee of land before his payment for the land, that his vendor had not fully paid the original vendor, is equivalent to a notice before purchase, and he is affected *pro tanto* as to the amount remaining unpaid by his vendor, and if he pays such amount he can enforce repayment from his vendor by deducting it from the purchase price or valuation of the land sold to him.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

George Fuller, and *Noah Hodge*, for Appellant.

Hunsaker, Britt & Goodrich, for Respondent.

BEATTY, C. J.—In this case the plaintiff gave one notice of appeal from the judgment and from the order denying its motion for a new trial, and one transcript of the record would have sufficed for both appeals, but two transcripts of the same record have been filed; one labeled "Transcript on appeal from the judgment," numbered 14346, and the other labeled "Transcript on appeal from order refusing new trial," numbered 14345, thus apparently making two cases of what is practically one.

All errors assigned and referred to in the argument are presented by the appeal from the order, and to that I shall confine my attention.

The objections urged by the respondent to the right of the appellant to be heard on this appeal are untenable. The order denying a new trial was made and entered June 21, 1890, and the notice of appeal designates it as of that date. After the appeal had been taken and perfected, the appellant, on the 19th of January, 1891, obtained a *nunc pro tunc* order of the superior court amending its order of June 21, 1890, by adding a recital to the effect that the motion for a new trial was based

and submitted on a bill of exceptions filed at the date of the hearing. The contention of the respondent is, that the last order superseded the first, and was and is the only order denying a new trial, and that it never has been appealed from. We think, on the contrary, the second order merely corrected the first, and took effect as of the date of the order corrected. In legal effect there was but one order. The new trial was denied June 21, 1890, and the time for appealing began to run at that date.

Another objection of the respondent to the consideration of the errors assigned (which relate solely to the sufficiency of the evidence to sustain the findings) is, that the bill of exceptions contains no specifications of the particulars in which the evidence is alleged to be insufficient.

The plaintiff in framing his bill of exceptions prefaced his specifications with this statement: "Plaintiff says that the evidence introduced on said trial is insufficient to support said decision, and said decision is against law in the following particulars." The respondent claims that because this statement embraces two distinct grounds of motion he was not apprised by the following specifications whether the attack upon the decision was on the ground of insufficiency of the evidence to sustain it, or on the ground that it was against law. But we think that whatever view may be taken as to the distinction between a decision against evidence and a decision against law, and however ambiguous the expression above quoted may be held to be, the specifications by which it was followed in this bill of exceptions were amply sufficient to remove the ambiguity, and apprise the defendant that the real ground of attack upon the decision was insufficiency of the evidence to justify the findings of the court, to the effect that he was a *bona fide* purchaser without notice and for a valuable consideration.

The case as presented entitles the appellant to a hearing on the merits.

The material facts are as follows: In December, 1887, the defendant Clara Foltz and the respondent Morgan agreed together that they would purchase from the plaintiff a small tract of land known as the Sorrento. The price of the tract was \$3,351.50. Foltz and respondent agreed that each would contribute one half of the purchase-money; that Foltz should make the purchase, take a conveyance of the land in her own name, and hold a half-interest in trust for respondent. In pursuance of this agreement, respondent gave Foltz his half of the purchase-money, and she procured the conveyance to be made to herself. But she did not pay the entire purchase price in cash. There was a balance of \$574.84, for which she gave her promissory note. Subsequently she and respondent agreed to make an exchange of lands; that is to say, respondent agreed to sell her a house and lot valued at \$5,300, for which she was to pay by assuming a mortgage thereon amounting to \$2,400, by conveying the Sorrento,—her half-interest therein being valued at \$1,250,—and by making up the balance in money. In pursuance of this agreement she paid \$1,000 in cash, conveyed the Sorrento to respondent, and gave him her note for the balance of \$650. He placed her in possession of the house and lot, but retained the title as security for the payment of her note. Her conveyance of the Sorrento was made May 9, 1888, and it is found by the superior court, upon evidence which is sufficient to sustain such finding, that up to this date respondent had no notice of the fact that she had not paid to plaintiff the full purchase price of said tract at the date of her purchase. But before the respondent made any conveyance to her of the house and lot, and while he still held the title as security for her note, he was fully informed that there was still due from her to the plaintiff, upon the purchase price of the Sorrento, the amount of her note for \$574.84.

This action is to foreclose the vendor's lien of the plaintiff on the Sorrento for said amount. The defendant Foltz suffered judgment by default. Her co-defend-

ant, the respondent Morgan, defended upon the ground that he was a *bona fide* purchaser for value.

The evidence, as above stated, is 'sufficient to sustain the finding of the court that he purchased in good faith, without any previous knowledge of the fact that his vendor had not fully paid her vendor, the plaintiff. But this is not sufficient to make out his defense. It was also necessary for him to show that he had paid for the land before he received notice of the vendor's lien, and this he had not done. The only payment he was to make was by conveyance of the house and lot which he exchanged for the Sorrento, and that he had not done before notice. The fact that he had placed Mrs. Foltz in possession was immaterial so long as he held the title as security for the balance due. If, upon receiving notice of the amount of her indebtedness to plaintiff, he had paid it, there is no doubt that he could have enforced repayment from her. The amount so paid would simply have been deducted from the valuation placed on her interest in the Sorrento, leaving her indebted to him on the house and lot that much more, secured, like her note for \$650, by the title which he held, and its collection enforceable by the same means.

The authorities cited in the appellant's brief amply sustain the proposition that notice before payment is equivalent to notice before purchase, and that when there has been a partial payment, before notice to a second vendee of the original vendor's lien, he is affected *pro tanto* as to the residue. It is unnecessary to repeat these citations here.

There is no direct and explicit finding that respondent paid for the Sorrento before notice of plaintiff's lien, nor is there any general finding which very clearly embraces such fact, though finding 3 was perhaps intended to embrace it. If the fact is not found, the judgment is erroneous; if it is found, the finding cannot be sustained. Upon either hypothesis the appellant is entitled to a new trial.

Judgment and order reversed, and cause remanded.

HARRISON, J., McFARLAND, J., SHARPSTEIN, J., PATERSON, J., DE HAVEN, J., and GAROUTTE, J., concurred.

[No. 14509. Department One. — August 9, 1892.]

S. C. LILLIS ET AL., APPELLANTS, v. THE EMIGRANT DITCH COMPANY, RESPONDENT.

FORMER ADJUDICATION — ACTION UPON DIFFERENT DEMAND — DEFENSE NOT

CONCLUDED — EVIDENCE OF DIFFERENT DEFENSE. — Although a judgment upon the merits is a conclusive determination respecting the plaintiff's right of action, and respecting all matters directly in issue in the action, and which might have been litigated in respect to the plaintiff's demand, yet the judgment, as an estoppel, is limited to the right of the plaintiff to maintain the action in which it was rendered, and a judgment for the defendant does not estop him, in another action upon a different demand, either as to the defense which was pleaded in the former action, or as to any other defense which might have been interposed therein, or from showing that the evidence, which established an affirmative defense which defeated the former action, was sufficient also to establish a different fact, which becomes material to a defense to any other demand by the same plaintiff.

ID. — JUDGMENT NOT CONCLUSIVE AS TO COLLATERAL MATTERS. — A judgment only concludes the parties as to facts in issue, as distinguished from facts in controversy, and is not conclusive of any matter which only comes collaterally in issue, nor of any matter incidentally cognisable; nor of any matter to be inferred by argument from the judgment; nor of any collateral facts which are offered in evidence to establish matters or facts in issue.

ID. — ACTION FOR DIVERSION OF WATER — DEFENSE OF PRESCRIPTIVE RIGHT — EFFECT OF JUDGMENT — ADMISSION OF ANSWER — EXTENT OF RIGHT.

— In an action for the diversion of water, where the real issue before the court is as to the right of the defendant to divert the water, the diversion of which is complained of, although the defendant pleaded as a defense a prescriptive right to divert a certain amount of water, with respect to which he asked an affirmative relief, the amount of the diversion to which the prescriptive right extends is not a material issue, and is not conclusively determined by a judgment in favor of the defendant, although the findings state such amount, in accordance with the answer, and does not preclude him from defending a subsequent action complaining of a greater diversion, by proof of a greater prescriptive right. The answer in the former action has only the effect, in the subsequent action, of an inconclusive admission of the fact stated as to the extent of the prescriptive right.

- ID. — FINDINGS OUTSIDE OF ISSUES IN FORMER ACTION — EVIDENCE — FAILURE TO FIND.** — Findings outside of the issues in the former action, as to the extent of the prescriptive right, not entering into the judgment, could have no effect in that action, and cannot have any greater effect in a subsequent action than would any other declaration of the judge who tried the former action, and cannot have the effect, as evidence in the subsequent action, to require a finding to be made upon an issue upon which there is no other evidence in support of the claim made.
- ID. — DIVERSION OF WATER — EVIDENCE — WASTE OF WATER.** — The complaint having averred that the court had decided in the former action that the defendants had the legal right to divert water enough to fill their ditch, evidence that after the diversion of the water by means of the ditch a portion of it was turned back into the stream by a wasteway is properly excluded.
- ID. — PLEADING — EFFECT OF FORMER JUDGMENT — EVIDENCE CONTRARY TO ADMISSION.** — An averment in the complaint that the court had decided certain facts in the former action carries with it the admission that the decision was sustained by sufficient evidence to support it, and precludes evidence for the plaintiff to prove the contrary; nor is the effect of such admission qualified or controlled by an averment in the complaint of the contrary fact sought to be proved.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Brown & Daggett, and *Daggett & Adams*, for Appellants.

W. D. Tupper, for Respondent.

HARRISON J.—The plaintiffs brought this action against the defendant to obtain a judgment declaring that the defendant is not entitled to divert from the channel of Cole Slough any greater quantity of water than forty cubic feet per second, or to divert from said channel any water whatever, except at times when there is more than five hundred cubic feet of water per second passing down the channel, and by the head of defendant's ditch; and that the defendant be perpetually enjoined from diverting any water from said channel, except at such times and in such an amount. In their complaint, the plaintiffs allege, as grounds for such judgment, that in an action brought by them in the superior court of Tulare County, in October, 1883, against the

defendant, for the purpose of obtaining a perpetual injunction against it from placing or maintaining a dam or other obstruction in Cole Slough, and from diverting from said channel any of the waters thereof by means of its ditch or otherwise, the defendant, in its answer to their complaint, alleged that it had acquired a prescriptive right to divert from said channel, by means of a ditch twenty feet wide at the bottom and forty feet wide at the top, about one hundred cubic feet of water per second, measured under a four-inch pressure, and that plaintiffs' right of action was barred by the statute of limitations; and that upon the trial of the issues in said action, the court found that the plaintiffs' right of action was barred by the statute of limitations, and that the defendant, in the month of December, 1875, had acquired and ever since had the right, as against the plaintiffs, to divert from the channel of said slough, by means of said dam and ditch, a sufficient amount of the waters flowing in said slough to fill a ditch twenty feet wide at the bottom and forty feet wide at the top; upon which findings judgment was rendered that the plaintiffs take nothing by their action. The complaint herein further alleges, that at the time of the construction of said ditch by the defendant in 1875, it claimed the right to divert from said slough sufficient water to fill the ditch at such times when there was more than five hundred cubic feet of water per second flowing down the channel by and beyond the head of the ditch, but that prior to October, 1883, of the one hundred cubic feet of water per second which was diverted into said ditch, sixty cubic feet were at all times turned back into the channel, and that the defendant had not permanently turned away, or claimed the right to turn away, more than forty cubic feet per second, and had not, prior to October, 1883, acquired the right to divert and permanently turn away from said channel more than forty cubic feet of water per second; that since the twelfth day of October, 1883, and during the pendency of the aforesaid action, the defendant had deepened its said

ditch, and enlarged its carrying capacity, and had diverted and permanently turned away from the channel of the slough one hundred and ninety cubic feet of water per second, and had threatened to, and unless enjoined from so doing would, permanently divert said quantity of water from said channel. The defendant, in its answer herein, traversed the allegations in the complaint, which denies its right to divert the waters of the channel, and alleged, in substance, that by virtue of its acts in December, 1875, and subsequent thereto, it has acquired the right to divert from the channel of said slough a sufficient quantity of water to fill its said ditch; that the capacity of said ditch is sufficient to carry one hundred and ninety cubic feet of water per second; and that it has by means of its said ditch and dam continuously, since December, 1875, diverted that amount of water from the channel of said slough; and that the plaintiffs' cause of action is barred by the statute of limitations. Upon the trial of these issues, the court found in favor of the defendant, and in its judgment adjudged and decreed "that in the month of December, 1875, the defendant acquired the right, and has ever since had and now has the right, as against the plaintiffs and the whole world, to divert from the waters flowing in Cole Slough a sufficient amount thereof to fill a ditch twenty feet wide at the bottom and forty feet wide at the top, to wit, about one hundred and ninety cubic feet of water flowing per second, for the purposes of irrigation." From this judgment, and from an order denying a new trial, the plaintiffs have appealed.

The complaint in the judgment roll in the former action between the parties in the superior court of Tulare County, which was offered in evidence on the part of the plaintiffs at the trial herein, set forth the rights of the plaintiffs as riparian proprietors to the waters of Cole Slough, and alleged that the defendant had, prior to February, 1883, constructed a dam in the channel of the slough, by means of which, and through a ditch leading therefrom which they had also constructed, they had

diverted the waters away from the plaintiffs' lands, and had thereby caused them damage to the amount of ten thousand dollars, and that they threatened to continue said trespass and damage, for which the plaintiffs asked for a judgment of ten thousand dollars damages, and that defendant be perpetually enjoined from maintaining said dam, or diverting any of the waters of said slough. The answer of the defendant therein traversed the allegations of trespass and damage, and, as a separate defense to the plaintiffs' right to maintain the action, alleged that by virtue of its acts, commenced in the year 1875, it had acquired a prescriptive right, by means of a ditch twenty feet wide at the bottom and forty feet wide at the top, and a dam across the channel of the slough just below the head of said ditch, then constructed by it, to divert from said slough about one hundred cubic feet of water flowing per second, measured under a four-inch pressure; and that the plaintiffs' cause of action was barred by the statute of limitations. Upon these issues, the court found that the plaintiffs had not been damaged in any sum of money whatever by any act of the defendant, and also found that the defendant had acquired a prescriptive right to divert from the waters of the slough a sufficient quantity of water to fill its ditch twenty feet wide at the bottom and forty wide at the top, and that the plaintiffs' cause of action was barred by the statute of limitations. The court also found that the defendant had never claimed the right to divert, and had never in fact diverted, any of the waters of said slough, except at times when there was more than five hundred cubic feet of water flowing per second in said slough by the head of the defendant's ditch; and upon these findings judgment was rendered that the plaintiffs take nothing by their suit, and that the defendant recover from them its costs.

It is contended by the plaintiffs that this judgment was a conclusive determination by the court that the right of the defendant to divert waters from said slough can be exercised only to the extent of one hundred cubic

feet of water per second, and to that extent only when there shall flow in the channel of the slough by the head of its ditch more than five hundred cubic feet of water per second, and that by said judgment the defendant is estopped from claiming any other right of diversion of said waters.

A judgment rendered in any action upon the merits is a conclusive determination respecting the plaintiff's right of action upon the demand sued on, and operates as an estoppel in any subsequent action upon the same demand between the same parties. If the judgment be in favor of the plaintiff, it estops the defendant from afterwards setting up any other defense to the claim than was presented in that action; and if it be in favor of the defendant, it estops the plaintiff from afterwards presenting any other argument or evidence in support of that claim. It is of such a judgment that it is frequently said, that it is conclusive not only as to the matters which were therein litigated, but as to any other matter which might have been litigated therein. It has become a final determination of the rights of the parties in reference to the demand upon which it was rendered. If, however, the defendant in such action sets up a defense which is sufficient to defeat the plaintiff's demand, although the judgment is conclusive against the plaintiff as to any ground or matter which he might have presented in support of such demand, yet in an action by him against the defendant upon another demand, it is not conclusive upon the defendant, either as to the defense which was pleaded therein, or as to any other defense which he might have interposed to the action. A judgment in favor of a defendant upon an affirmative defense to the plaintiff's demand conclusively establishes the existence of the fact which constitutes that defense, and estops the plaintiff from questioning its sufficiency to defeat his cause of action, or from maintaining another action upon the same demand. It does not, however, estop the defendant, in an action upon another demand, from showing that the evidence by which that fact was

established is sufficient to establish a different fact, nor does it limit such evidence to the determination of the defense which was then before the court. The issue then tried by the court was the right of the plaintiff to maintain his action, and the judgment as an estoppel is limited in its operation to that issue; but the fact by which the defendant defeated the plaintiff's right of recovery is not so limited, and may be invoked by him in support of a defense to any other demand by the same plaintiff. As to the successful party, the judgment is conclusive in favor of his right, but not as to all the means which he might have presented for the purpose of establishing that right. In other words, it is conclusive upon the issues, but not upon the facts necessary to establish those issues. In any other action between the same parties upon a different demand, though involving facts which were litigated in the former action, such judgment is conclusive only as to the same matters in issue which were determined in the former action, and which were also essential to the rendition of the judgment. It was stated by Lord Chief Justice De Grey in the *Duchess of Kingston's* case, that "neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which only came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment." "The matter adjudicated, to become as a plea, a bar, or as evidence conclusive, must have been directly in issue, and not merely collaterally litigated. (1 Greenl. Ev., sec. 528; *Fulton v. Hanlow*, 20 Cal. 451, 486; *McDonald v. B. R. W. & M. Co.*, 15 Cal. 145; *Hopkins v. Lee*, 6 Wheat. 109.) It must be a fact 'immediately found according to the pleadings, not that on which the verdict was merely based,—a fact in issue as distinct from a fact in controversy.' (*Potter v. Baker*, 19 N. H. 166; *McDonald v. B. R. W. & M. Co.*, 15 Cal. 145.)" (*Caperton v. Schmidt*, 26 Cal. 494.) "A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the de-

fendant controverts in his pleadings; while collateral facts are such as are offered in evidence to establish the matters or facts in issue; and notwithstanding they may be controverted at the trial, they do not come within the rule." (*Garwood v. Garwood*, 29 Cal. 521.)

In *Cromwell v. Sac Co.*, 94 U. S. 351, the plaintiff had brought an action against the defendant upon certain coupons, in which judgment was rendered in favor of the county, upon the ground of fraud and illegality in the original issuance of the bonds. Subsequently, the plaintiff in this action, who was the real party in interest in the former action, brought another suit upon other coupons on the same bonds, and although it was contended that the former judgment was an estoppel against the recovery, yet it was held otherwise, and that the plaintiff was not estopped from proving that he had paid value, and was a *bona fide* purchaser, since the former judgment was not a conclusive determination that the bonds were invalid, but was conclusive only upon the fact that they were invalid in the hands of one who had not paid value for them. In *Campbell v. Consalus*, 25 N. Y. 613, an action had been brought to declare a mortgage satisfied, on the ground that it had been paid, and an accounting between the parties was had therein, from which it was ascertained that there was \$2,788 unpaid thereon, and thereupon judgment was rendered dismissing the action. Afterwards an action was brought to foreclose the mortgage, and it was contended that the former judgment was conclusive as to the amount unpaid thereon, but it was held otherwise, upon the ground that the amount due on the mortgage was not put in issue in the former action, but only the fact whether the mortgage had been fully paid, and that the amount that was unpaid was only incidental and collateral to this main issue. (See also *Lewis and Nelson's Appeal*, 67 Pa. St. 153; *King v. Chase*, 15 N. H. 9; *Moulton v. Libbey*, 15 N. H. 480; *Stannard v. Hubbell*, 123 N. Y. 520. In *Sweet v. Tuttle*, 14 N. Y. 465, it was held that where the defendant, together with five others as plaintiffs, had brought

an action in which a judgment was rendered against them, he was not estopped, in a subsequent action against him by the defendant in the former action arising out of the same transaction, from showing that seven others were jointly liable with him, and ought to have been joined as defendants in said action.

When, therefore, in the second action the former judgment is offered in evidence, it is necessary to ascertain, in the first instance, whether the cause of action upon which it was rendered is the same as that under prosecution, and if so, it becomes, as a matter of law, conclusive upon the rights of the parties in the second action. If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain, as a question of fact, what issues or matters were determined in the former action, and then to determine, as a matter of law, whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. (1 Greenl. Ev., sec. 528.) Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein; and the evidence which was introduced in support of such issues may always be introduced in support of a defense in any other action. The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense. For example, if, in a suit in ejectment, the defendant alleges and proves a right to the possession of the land by virtue of having acquired an estate therein for years, he will not be precluded, in a subsequent action against him by the same plaintiff to quiet title to the same land, for showing that he was, at the time of the former

judgment, the owner in fee of the land. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included herein, or necessary thereto." (Code Civ. Proc., sec. 1911.)

The former action between the parties hereto was brought by the plaintiffs for the purpose of recovering damages resulting from the diversion of the water, and to prevent the defendant from making any further diversion. The issue presented by the plaintiffs for determination by the court was the right of the defendant to make any diversion of the water, and for the purpose of meeting that issue it was incumbent upon the defendant to establish a right of diversion to such an extent as would preclude the plaintiffs from a recovery; but the limit of the extent to which that right had been acquired was immaterial, except as a matter of evidence upon the controverted fact in issue. If it had such right, the plaintiffs had no right to recover damages therefor, however much loss they might have suffered. The first question, then to be determined, and the real issue before the court, was the right of the defendant to do the act which the plaintiffs charged as an invasion of their rights. If that right existed, the plaintiffs' cause of action fell, and for the purpose of showing that such right did exist, the defendant pleaded and the court found that all the water which the plaintiffs showed to have been diverted by the defendant was taken under a right acquired by it by prescription. The amount of the diversion to which that prescriptive right extended was not an issue in the case. The court was not called upon to determine the extent of the prescriptive right, but only whether the diversion shown by the plaintiffs was within the limits of that right. The defendant did not seek any affirmative relief by reason of this prescriptive right thus set up, but had merely pleaded it as a defense to the plaintiff's demand. It was incumbent upon the plaintiffs, in order to maintain their demand,

to show to the court the entire extent of the diversion complained of, but it was only necessary for the defendant to show such facts as would defeat the showing made by the plaintiffs. If the judgment had been in favor of the plaintiffs, it would have been a conclusive determination against the defendant, by which it would have been estopped from afterwards showing a right to any diversion of the water; but the judgment in favor of the defendant only determined that the plaintiffs had no right to recover damages for any diversion that had been made by it, and did not estop the defendant from showing, in another action, that its prescriptive right was greater than was necessary for the defeat of the plaintiff's claim in that action. In *McDonald v. Bear R. & M. Co.*, 15 Cal. 145, the plaintiff, in a former action to recover damages for the diversion of water, had alleged the right to one thousand inches of water, as against the defendants, and had recovered a verdict against them for damages. In a subsequent action to enjoin them from diverting water from the stream, it was contended that the plaintiff's right to this quantity of water had been determined in the prior action, but the court held that the averment in regard to the quantity of water to which the plaintiff was entitled was immaterial, and that his right to recover could not have depended upon such proof.

Upon the allegations and the evidence before it, the court found in the present case that in the month of December, 1875, the defendant, under a claim of right, appropriated and diverted a portion of the waters flowing in said Cole Slough, sufficient to fill a ditch twenty feet wide on the bottom, and forty feet wide on the top, leading out from Cole Slough, and had, each and every year since said month, continuously, and by means of the same ditch and the same dam, under the same claim of right, taken and diverted sufficient water to fill said ditch for the purposes of irrigation, adversely to the plaintiff and the whole world, and that said ditch is of sufficient capacity to carry about 190 cubic feet of

water flowing per second, and that defendant has, by means of said ditch and dam as aforesaid, under the same claim of right, and in the same manner during the same time, carried, taken, and diverted from said slough about 190 cubic feet of water flowing per second; and as a conclusion of law, that it had acquired a prescriptive right to divert that amount of water from the slough. The evidence before the court was sufficient to sustain this finding, unless the judgment in the former action was conclusive against the right of the defendant to divert more than one hundred cubic feet of water per second; but, as we have before seen, that judgment cannot be regarded as conclusive against the defendant upon this point. The judgment itself was merely a determination that the plaintiffs had no right to recover damages against the defendant for any diversion that it had made, and aside from its determination of the facts implied in its finding upon the statute of limitations, the only issue determined by the court which was essential to the judgment was, that the defendant had acquired a right "to divert from the waters flowing in Cole Slough a sufficient amount thereof to fill a ditch twenty feet wide at the bottom and forty feet wide at the top, to be used for the purposes of irrigation." The effect of this judgment, and also of the determination of this issue, is not limited by the fact that the defendant therein, in its answer, in addition to its plea of the statute of limitations, alleged that it had acquired the right to divert one hundred cubic feet of water per second. That allegation was only a statement made by the party for the purpose of meeting the plaintiff's demand. As an admission in the action in which it was made, the defendant would have been bound, but in any other action it would have no higher effect than any other statement. (*Boileau v. Rutlin*, 2 Ex. 681.) "As a mere statement or allegation, it had no greater effect than any other mere admission or assertion of a party respecting a material fact. As an admission, it was evidence, but not conclusive. In the judgment there was no determina-

tion of the fact. On the contrary, it simply shows that the plaintiffs failed in their action, and that the defendant recovered his costs." (*Sweet v. Tuttle*, 14 N. Y. 470.) The court did not purport, either in its finding or in its judgment, to determine the extent to which the defendant had acquired the right to divert the waters. It did determine that it had the right to divert a sufficient amount to fill a ditch of certain dimensions, but did not determine what that amount was, or the capacity of the ditch. In the present case it determines that that ditch is of sufficient capacity to carry about 190 cubic feet of water flowing per second, and that that is the amount which the defendant has, during the exercise of its prescriptive right, taken and diverted from said slough. The evidence was sufficient to sustain the finding of the court, that the capacity of the ditch was sufficient to divert this amount of water per second. The contention of appellants, that there was uncontradicted testimony that in a certain part of the ditch its capacity was much less, does not impair the testimony respecting the capacity of the ditch at the point of diversion. The section of the ditch to which this evidence of the plaintiffs was directed was about three miles below the point of diversion, and the testimony as to its capacity at that point is not inconsistent with the testimony respecting its capacity at the point of diversion, since it was shown that much of the water was taken from the ditch before it reached that point.

The failure of the court to find upon the claim of the plaintiffs, that the defendant had no right to divert any of the waters of the slough, except at times when there is more than five hundred cubic feet of water in the channel, flowing past the head of the defendant's ditch, cannot be regarded as error. The plaintiffs were not entitled to a finding upon this issue, unless there was evidence before the court in support of their claim, nor unless a finding thereon would counteract the other findings to such an extent as to invalidate the judgment. The only evidence in support of the averment is the

finding to that effect made by the court in the former action; but as that finding was outside of the issues in that action, and did not enter into the judgment therein, it could not have any effect in that action, and cannot have any greater effect as evidence in the present action than would any other declaration made by the judge who tried the former action. (See *People v. Johnson*, 38 N. Y. 63; 97 Am. Dec. 770; *Springer v. Bien*, 128 N. Y. 99.)

The plaintiff Lillis was asked whether, prior to the twelfth day of October, 1883, the water that was diverted at the head of defendant's ditch was carried down to a point between two and three miles below the headgate of the defendant's ditch, and then a portion of it at that point turned back into a waste-way, through which it returned to the slough. This question was objected to, and the answer excluded by the court. In this ruling the court did not err.

The plaintiffs had alleged in their complaint, that in the action brought by them against the defendant, October 12, 1883, it had been decided by the court that the defendant had, prior thereto, acquired the right to divert, by means of its ditch and dam, from the waters flowing in the slough, a sufficient amount thereof to fill a ditch twenty feet wide at the bottom and forty feet wide at the top, and had, since the month of December, 1875, continuously, by means of that ditch, and under its said claim of right, taken and diverted sufficient water to fill said ditch. This averment of such decision by the court carried with it the admission that the decision was sustained by sufficient evidence, and was in accordance with the fact, and was itself an admission of record, which was inconsistent with the evidence thus offered, and which the plaintiffs could not be permitted to contradict. The effect of the admission was not qualified by a previous averment in the complaint, that the defendant had not, in fact, at any time prior to October 12, 1883, permanently diverted more than forty cubic feet of water per second from the

slough, for such averment was itself contradictory to the averment of what the court had decided, and between the two inconsistent averments, that respecting the decision of the court has the greater weight, and must be taken against the plaintiff. Upon the case presented in their complaint, the plaintiffs, by this averment of the decision of the court, conceded, in legal effect, the right of diversion from the slough of water enough to fill the ditch, and it was immaterial that, after such diversion had been rightfully made by the defendant, some of the water found its way back to the slough. The plaintiffs, moreover, did not attempt to show that the defendant caused any of the water that had been diverted by it to be returned to the slough.

The judgment and order are affirmed.

GAROUTTE, J., concurred.

PATERSON, J.—I concur. I do not think it was essential in the former action for the court to determine the quantity of water flowing through the ditch, but if it was material, such quantity was not fixed. The court, by its decree in this action, has made certain that which was left uncertain in that respect in the former case, where the findings described the quantity as being "sufficient to fill a ditch twenty feet wide at the bottom and forty feet wide at the top." Neither the findings nor the judgment in that case attempt to fix the number of cubic feet of water, and as neither the depth of the ditch nor its grade is given it is impossible to tell what the capacity of the ditch was. It is true, the defendants, in their answer in that action, claimed that they had acquired by appropriation "the right to divert from said Cole Slough, and to use for the purposes of irrigation and other purposes, as aforesaid, *about one hundred cubic feet of water flowing per second, measured under a four-inch pressure, of the waters thereof*"; but as counsel for appellants himself states, the addition of the words "measured under a four-inch pressure" makes the whole

description "a hydraulic absurdity. One hundred cubic feet of water per second is one thing. One hundred cubic feet of water measured under a four-inch pressure is altogether a different thing. In calculating the discharge of flowing water, the principles of hydraulics require that the discharge shall be measured by time or by pressure, and a discharge cannot, in the nature of things, be estimated by time and pressure together."

The decree in this case describes the ditch exactly as it was described in the former action.

[No. 14776. Department Two. — August 9, 1892.]

J. W. BEALL, RESPONDENT, v. S. C. FISHER, APPELLANT.

EVIDENCE—TERMS OF WRITTEN AGREEMENT.—When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and as between the parties there can be no other evidence of the terms of the agreement, except in certain cases mentioned in section 1856 of the Code of Civil Procedure.

ID.—MERGER OF ORAL NEGOTIATIONS.—All the oral negotiations and agreements concerning the exchange of lands are merged in the deeds and mortgages given in pursuance of such negotiations, and evidence of prior negotiations contradicting the terms of such instruments is inadmissible.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion.

Oregon Sanders, and Church & Corey, for Appellant.

H. H. Welsh, for Respondent.

VANOLIEF, C.—On May 12, 1890, plaintiff was the owner of 320 acres of land situated in the county of Fresno, subject to a mortgage to secure his debt to the mortgagee, then amounting—principal and interest—to about \$5,700. At the same time defendant owned 1,010 acres of land situated in Tulare County, subject to

a mortgage to secure his debt for the principal sum of \$6,060, on which had then accrued about \$118 interest.

On that day verbal negotiations were commenced between plaintiff and defendant for an exchange of their lands, and proceeded so far that they supposed they understood each other as to the terms upon which the exchange was to be made. About ten days thereafter (May 22d), they met at the office of Mr. L. L. Cory, an attorney at law and notary public, for the purpose of executing the deeds and other writings necessary to effect the exchange. Nothing of their previous negotiations had been reduced to writing. Mr. Cory drew the deeds and other papers, which were then executed, consisting of a deed from plaintiff to defendant of the land in Fresno County, subject to the mortgage above mentioned, which mortgage the defendant by the terms of the deed assumed and agreed to pay; also a deed from defendant to plaintiff of defendant's land in Tulare County, which deed contained the following: "This grant is made subject to a mortgage for \$6,060 to the California Savings and Loan Society, which the grantee assumes and agrees to pay," and also a promissory note of defendant to plaintiff for \$3,000, to secure which defendant executed to plaintiff a mortgage on the land in Fresno County which had been conveyed to him by the plaintiff.

This action is founded upon what is alleged to have been the verbal agreement on May 12, 1890. Plaintiff alleges that the verbal agreement was to the effect that the defendant was to pay the interest upon his mortgage on the Tulare County land up to the date when the deeds should be executed, and also "to pay said plaintiff upon the day when said conveyance and exchange should be made, as one of the considerations for said exchange, the sum of \$360, the difference between \$5,700, amount of mortgage upon plaintiff's land, and \$6,060, amount of mortgage upon said defendant's land." Plaintiff also claims that defendant is indebted to him in the sum of twenty dollars, for interest on the note and mortgage

for three thousand dollars above mentioned. It is alleged that defendant has refused to pay any of these several sums.

The defendant denies the alleged verbal agreements, and alleges, in substance, that all verbal negotiations for the exchange of lands were merged in the above-mentioned deeds, note, and mortgage.

The court found for plaintiff on all the issues, and rendered judgment in his favor for the amount of the several sums claimed.

Defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. Appellant contends that all prior oral negotiations and agreements between the parties were merged in the deeds, mortgage, and promissory note drawn by Cory and executed by the parties on May 22, 1890; and that the court erred in admitting in evidence, against defendant's objections, such prior negotiations; and this point seems to be well taken.

Section 1625 of the Civil Code provides that "the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." And it is provided by section 1856 of the Code of Civil Procedure: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms"; that as between the parties, there can be no other evidence of the terms of the agreement, except in certain cases, of which this is not one. And further declares that "the term 'agreement' [used in this section] includes deeds and wills, as well as contracts *between parties*." (*Nicholson v. Tarpey*, 89 Cal. 617; Wharton on Evidence, secs. 1014, 1054.)

In this case the plaintiff was permitted to testify, not only to prior negotiations, but also to alleged prior agreements flatly contradictory of the terms of the deed which he accepted from the defendant; not for the pur-

pose of disputing, correcting, or construing the deed, but for the purpose of compelling the defendant to pay money, which, by the plain terms of the deed, he (plaintiff) had assumed and agreed to pay.

That the negotiations were continued up to and during the time the deeds were being drawn by Mr. Cory, and that plaintiff accepted the defendant's deed with full knowledge of its contents and meaning, is made clear by his own testimony, as follows:—

“When the papers were drawn up, Mr. Fisher, G. Frank Abbott, Mr. Cory, and myself were present. I told Mr. Fisher at that time that there was a difference of over three hundred dollars due me. I had spoken to him several times of the difference in the mortgages in my favor. Mr. Fisher said that he was not to pay that; that he would not pay it, or something. Don't know exactly what he did say. He expressed himself as not desiring to pay it.

“Q. Didn't he say that that was not the agreement, that it was all understood, and that was not the agreement, and that he was to give you a mortgage for three thousand dollars? A. Just what he said I couldn't tell you.

“Q. Was not that the substance? A. He said he was not to pay that; was not going to pay it. This took place before the papers passed. After that I took the deed and accepted the three-thousand-dollar mortgage. I could, as a matter of fact, have refused to have gone on with the trade then. I thought of doing it, but did not. Mr. Fisher had refused to pay me this money. I didn't know that he positively refused to pay it. He said that was not his understanding. He never agreed at any time after that to pay it. At the time the trade was made and the deed and papers passed he didn't agree to it. At that time I told him,—I said there was a difference there which was due me. Mr. Fisher said he didn't understand he was to pay it. I didn't say, ‘All right, let's go ahead.’ After this the papers passed,—my deed to Mr. Fisher and his deed to me.”

2. As to the count for twenty dollars interest on the

mortgage for three thousand dollars, the evidence was not subject to the objection above considered, and though conflicting, was sufficient to justify the finding upon that count.

I think the judgment and order should be reversed, and a new trial granted.

BELCHER, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

SHARPSTEIN, J., McFARLAND, J., DE HAVEN, J.

[No. 18277. In Bank. — August 10, 1892.]

**S. G. PHELPS, APPELLANT, v. J. E. BROWN ET AL.,
RESPONDENTS.**

VENDOR AND PURCHASER — RESCISSION OF CONTRACT OF SALE — RECOVERY OF PURCHASE-MONEY PAID — RECOUPMENTS OF DAMAGE. — When a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments of the purchase-money paid, less the actual damage to the vendor, occasioned by his breach of the contract.

ID. — RECOVERY FROM AGENTS OF VENDOR — ESTOPPEL OF AGENT. — Where a firm of real estate agents, who negotiated a sale and purchase of land, received from the vendee for the vendor a check for a sum of money as a deposit or first payment upon the land, and took a receipt therefor from the vendor, as the agents of the vendee, and upon an abandonment and rescission of the contract by the parties, received back the amount of the check from the vendor, delivering back and canceling their receipt therefor as agents of the vendee, they are estopped from denying an agency for the vendee, and the vendee is entitled to recover back from such agents the amount so received by them.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion of the court.

Jackson Hatch, T. B. Laine, and Laine & Hatch, for Appellant.

Crandall & Biddle, for Respondents.

BEATTY, C. J. — This is an action by the vendee in a contract for the purchase and sale of lands to recover back the sum of five hundred dollars, paid at the date of the contract as a forfeit. The decision of the superior court was against the plaintiff, and she appeals from the judgment on the judgment roll.

The following are the material facts disclosed by the record: "In June, 1887, one Norton and wife owned a tract of land in Santa Clara County, which was encumbered by a mortgage for nine thousand dollars, and the plaintiff, a married woman, owned a house and lot in the city of San José. The Nortons wished to exchange their land for the lot of plaintiff, and to negotiate the exchange they employed the defendants, who were real estate agents doing business in San José, as partners under the firm name of Brown & Ensign, and orally agreed to pay them five hundred dollars as a commission if the exchange should be made. The proposition of the Nortons was, that they would convey their land to the plaintiff for twenty thousand dollars, and that in payment thereof she should assume and pay the mortgage on the land, and should convey her lot to them for six thousand five hundred dollars, and pay to them the balance of four thousand five hundred dollars in cash when the deeds should be executed. This proposition was put in writing and given to the defendants, and they delivered it to the plaintiff. She was willing to accept the proposition and make the trade if she could realize \$6,750 for her lot, and not otherwise. The defendants then agreed to pay her \$250 out of their commissions when the trade should be consummated. This arrangement was satisfactory, and she thereupon drew her check upon a local bank for five hundred dollars, payable to the Nortons, and handed the same to the defendants as a deposit or first payment. The defendants on the same day gave the check to the Nortons, who executed a receipt therefor, closing with the words, 'trade to be finished within two weeks from date, or this deposit to be forfeited without recourse. Title to prove good or no

sale, and this deposit to be returned.' A few days later the defendants handed back to the plaintiff her check, and she thereupon gave to them, in place of the check, five hundred dollars in money, which they at once paid over to the Nortons. Subsequently it appeared from the abstract of title furnished by the plaintiff that an attachment issued in an action against her husband had been levied on her property; and on learning this the Nortons refused to accept her deed, or to carry out the proposed exchange, unless she would have the attachment removed. She offered to give them a warranty deed, but refused to procure the discharge of the attachment. The Nortons were ready and willing to complete the trade, and tendered a deed of their property to plaintiff, but she never offered to convey to them an unencumbered title to her property, and never tendered or offered to pay the balance of the purchase-money. Thereupon the Nortons abandoned the trade, and without the knowledge of plaintiff, and without any directions as to the disposition to be made of the money, returned the five hundred dollars to the defendants, and the latter returned to them their receipt, with an indorsement thereon as follows:—

“‘Money returned, and their receipt is canceled.

“‘July 25, 1887. BROWN & ENSIGN.’”

“‘We agree to release the signers of this receipt from any expense, legal or otherwise.

“‘BROWN & ENSIGN.’”

Upon these facts two questions arise: 1. Was the plaintiff entitled to receive her money back when the Nortons abandoned the trade? 2. If so, can she recover it back from these defendants?

It is assumed throughout the argument, and we shall so assume without deciding, that the failure or refusal of plaintiff to clear her land of an attachment levied upon it in a suit against her husband was a failure or refusal to do something which her contract bound her to do; and that she thereby placed herself in default exactly the same as if she had refused to pay an installment of

the purchase price when due. But assuming this to be so, and that the Nortons were not in default when they abandoned the trade and put an end to the contract, the plaintiff nevertheless immediately became entitled to receive back the five hundred dollars which she had paid, less the actual damage caused by the breach of her contract. This proposition is fully sustained by two recent decisions of this court. (*Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257.) Respondents, however, insist that these decisions are in conflict with later as well as earlier decisions of this court; citing *England v. Rogers*, 41 Cal. 420; *Scott v. Glenn*, 87 Cal. 221; *Dennis v. Strassburger*, 89 Cal. 583; *Easton v. Montgomery*, 90 Cal. 307; *Newton v. Hull*, 90 Cal. 487; *Anderson v. Strassburger*, 92 Cal. 38.

It is true that in the case of *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, which was decided in Department, and never brought under review of the court by petition for hearing in Bank, it was held contrary to the earlier and later decisions, that in case of mutual and dependent stipulations to be concurrently performed, both parties are in default if the time of performance passes without tender of performance on either side, and that the contract is at an end. As to this proposition, that case has been expressly overruled in *Newton v. Hull*, 90 Cal. 492, and the correct rule of the earlier cases restored; but the further proposition involved and decided in that case, and in *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, viz., that when a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase-money, less the actual damage to the vendor occasioned by his breach of contract, has never been reversed or modified. In *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, the parties expressly stipulated that one thousand dollars, paid at the date of the contract, should be retained by the vendor as liquidated damages in case of failure by the vendee to com-

plete the purchase, and this stipulation was held void under the statute. In *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, it was held, and we think correctly, that a stipulation to forfeit the first payment in case of failure by the vendee to complete the purchase was in effect a stipulation for liquidated damages, and void. In both cases it was held that the vendee could recover, subject to the right of the vendor to recoup his actual damage.

In this case the plaintiff's right to recover does not depend on the proposition erroneously decided in *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187; for the contract with the Nortons was ended by their voluntary abandonment of it in consequence of her failure to clear the title to the property which she was to convey in the exchange. The contract was at an end, and the Nortons were left with plaintiff's money in their hands. There is no claim in the pleadings or finding by the court that they were actually damaged by the failure of plaintiff to complete the transaction; they could not retain the five hundred dollars as liquidated damages, and therefore it became their duty to pay it back.

There is not the slightest conflict in the decisions of this court as to these points. In each of the several cases cited and relied on by respondents in which the vendee of land was defeated in an action to recover purchase money, the decision went upon the ground that the vendee was not only not in default, but the contract was still in force. (*Scott v. Glenn*, 87 Cal. 221; *Dennis v. Strassburger*, 89 Cal. 583; *Easton v. Montgomery*, 90 Cal. 307; *Anderson v. Strassburger*, 92 Cal. 38.)

The respondents endeavor to distinguish *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, from this case, upon the ground that there it appeared that the vendee, long after he was in default, and the vendor had elected to treat the contract as abandoned and rescinded, had made a tardy offer of performance. But while the fact was as the respondents claim, the decision did not proceed upon that distinction, but upon the broad ground above stated, as to which this case is practically the

same. We are entirely satisfied with the correctness of the decision in *Drew v. Pedlar*, and upon that authority hold that when the Nortons abandoned their contract the plaintiff was entitled to receive her five hundred dollars back.

As to the second question above stated, the respondents claim that there can be no recovery against the defendants, even if the Nortons were liable to refund the purchase-money paid; and they rely upon the decision in *Bogart v. Crosby*, 80 Cal. 195. But this case is very different from that. There the defendants were agents for the vendors exclusively, and they claimed the money as their own against both parties to the contract. They did not receive it under any agreement, express or implied, to pay it over to the vendee or to assume the liability of the vendor. Here the facts found by the superior court fully justified its conclusion, "that the defendants, on receiving the five hundred dollars from the Nortons, took their place as to the money and assumed all liabilities as to the plaintiff that the Nortons had incurred."

But more than this, the findings show clearly that the defendants received the money as plaintiff's agent and for her use. They held the receipt of the Nortons as her agents, and when they gave it up they canceled it as her agents. Unless they were her agents for that purpose, they had no right to deliver up and cancel that receipt on return of the money; and having assumed to represent her for one purpose, they cannot be heard to say they did not represent her for the other.

The judgment is reversed and the cause remanded, with directions to the superior court to enter a judgment for the plaintiff on the findings.

DE HAVEN, J., McFARLAND, J., SHARPSTEIN, J., PATTERSON, J., HARRISON, J., and GAROUTTE, J., concurred.

XCV. CAL.—87

[No. 14272. In Bank. — August 10, 1892.]

**A. W. POTTER, RESPONDENT, v. PARKER DEAR,
APPELLANT.**

CORPORATION — UNPAID SUBSCRIPTIONS TO STOCK — CREDITOR'S BILL TO ENFORCE PAYMENT. — A judgment creditor who has exhausted his legal remedies against a corporation may maintain a creditor's bill against one or more stockholders to recover the amount due to the corporation upon unpaid subscriptions to its stock.

ID. — PARTIES TO CREDITOR'S BILL — NON-JOINDER OF CORPORATION — PLEADING — WAIVER OF OBJECTION. — The corporation should be made a party to a creditor's bill against subscribing stockholders, but is not an indispensable party, unless the object of the action is to secure an adjudication of the rights and liabilities of all the parties, and a final settlement of all the affairs of the company; and when the action is against a single stockholder, objection to the non-joinder of the corporation is waived, if not made by demurrer or answer.

ID. — JURISDICTION OF EQUITY — LEGAL REMEDY AGAINST STOCKHOLDERS — INSOLVENCY OF STOCKHOLDERS NOT JOINED. — A court of equity will entertain jurisdiction over an action by a judgment creditor who has exhausted his legal remedies against the corporation to compel payment of unpaid subscriptions to its stock, without regard to the exhaustion of any concurrent legal remedy against the stockholders upon their individual liability, and without regard to the insolvency of subscribing stockholders not joined as defendants.

ID. — LAND AND IMPROVEMENT COMPANY — SUBSCRIBED CAPITAL STOCK. — A land and improvement company, organized for the purpose of acquiring real property, by purchase or otherwise, buying and selling the same, building hotels, street-railroads, and otherwise developing lands, stands upon the same basis as banking, railroad, insurance, and like commercial corporations having a subscribed capital stock.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The action was brought by the respondent as a judgment creditor of the Santa Rosa Land and Improvement Company, to compel a payment of an unpaid subscription of the appellant to its capital stock. Other facts are stated in the opinion of the court.

J. E. Deakin, and A. Brunson, for Appellant.

A. E. Cochran, and Byron Waters, for Respondent.

PATERSON, J.—Many of the questions discussed by

counsel were considered in *Baines v. Babcock*, *post*, p. 583, this day filed, and upon the authority of that case must be determined adversely to the contentions of appellant herein.

In this case the corporation was not made a party. No objection on the ground of non-joinder of the corporation as a party defendant was made in the court below by demurrer or by answer. The defect was therefore waived. (Code Civ. Proc., sec. 434.) Doubtless the corporation should always be made a party to the suit; but it is not an indispensable party, unless the object of the action is to secure an adjudication of the rights and liabilities of all the parties, and a final settlement of the affairs of the company. When the purpose of a suit is to compel payment of a debt out of the unpaid subscription of a single stockholder, the corporation if not made a party cannot be prejudiced by a judgment against the stockholder, and if he sees fit to go to trial and judgment without objecting to the non-joinder of the corporation, he will not thereafter be heard to complain. It is not claimed in this case, as it was in *Baines v. Babcock*, that all the stockholders were necessary parties defendant.

It is contended by appellant that the Santa Rosa Land and Improvement Company is similar in its nature to the South Mountain Consolidated Mining Company, the mining corporation considered by Judge Sawyer in 8 Saw. 366. It is a sufficient answer to this contention to state the purposes for which the corporation under consideration was organized, viz., "for the purpose of acquiring real property by purchase or otherwise in the county of San Diego, state of California, buying and selling the same, building hotels, street-railroads, and otherwise developing lands." It stands upon the same basis as the "banking, railroad, insurance, and like commercial corporations having a *subscribed* capital stock," referred to by Judge Sawyer.

It is claimed that there is another distinction between this case and the case of *Baines v. Babcock*. It is said

that the complaint in the latter case showed that some of the stockholders of the corporations were either insolvent or absent from the state, and that no such claim is made in this case; that there is no necessity shown, therefore, for invoking the powers of a court of equity, plaintiff having a complete and adequate legal remedy under section 322 of the Civil Code; that the decisions cited by respondent "were all rendered at places or in times when there was no legal remedy available to the creditor except one against the *corporation itself*"; and that there is no authority for holding that "an equitable remedy can be pursued by a creditor before he has exhausted his legal remedies, both against the corporation and the stockholders," unless by reason of the insolvency or absence from the state of some of the stockholders, as in the case of *Baines v. Babcock*, the legal remedy afforded by the statute would not be adequate.

We do not think there is any materiality in the distinction pointed out, or any merit in the contention made thereon. It is true, in *Baines v. Babcock* the complaint alleged that some of the stockholders were "non-residents or insolvent persons," which allegation was denied, but the court treated the issue as an immaterial one, and found that the stockholders referred to were not necessary parties to the action, and this view was sustained here. In *Morawetz on Private Corporations*, it is said that a judgment creditor, after the return of his execution *nulla bona*, may maintain an action "to compel the share-holders to contribute so much of the capital subscribed by them as will be sufficient to satisfy the claims of the plaintiff and other creditors who may come in for payment. Such a proceeding may be maintained, although the creditors have a statutory right to proceed against the share-holders directly at law." (Sec. 866.) The error of the appellant arises from his failure to consider the unpaid subscriptions as a corporate asset, which a creditor has the undoubted right in equity to follow wherever the same may be found, when his remedy at law against the corporation has been ex-

hausted. The corporation and the stockholder are as distinct and separate debtors with different undertakings as if they had never had any business relations with each other, and we know of no rule which requires a creditor to exhaust his legal remedies against all his debtors before he can, in equity, pursue the assets of one of them against whom he has exhausted his legal remedy. Mr. Thompson, in his chapter on "The Forum: Law or Equity," says: "The elemental rule of equity jurisprudence that a court of this character will deny its aid to a suitor who has an adequate remedy at law, except in cases of concurrent jurisdiction, applies to this subject only so far as that these courts withhold their aid to a judgment creditor of a corporation in respect to the liabilities of share-holders, when there are legal assets of the corporation within reach of his execution. The general rule is, that although a creditor has a concurrent remedy against a share-holder at law, this does not oust the jurisdiction of the courts of equity." (Thompson on Stockholders, sec. 265.)

Judgment and order affirmed.

DE HAVEN, J., SHARPSTEIN, J., and MCFARLAND, J. concurred.

HARRISON, J., dissented.

[No. 14224. In Bank. — August 10, 1892.]

W. E. BAINES, RESPONDENT, v. E. S. BABCOCK, JR.,
ET AL., APPELLANTS.

CORPORATIONS — UNPAID SUBSCRIPTIONS TO STOCK — CREDITOR'S BILL TO ENFORCE PAYMENT. — A judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all the creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same.

ID. — STOCKHOLDER'S PERSONAL LIABILITY TO CREDITORS — CONSTRUCTION OF CODE. — The remedy given by section 322 of the Civil Code, fixing the personal liability of the stockholders of a corporation, is purely statutory, and furnishes to creditors of corporations additional security, by making the stockholders directly liable for their proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.

ID. — SEVERAL LIABILITY OF STOCKHOLDERS UPON SUBSCRIPTIONS — PARTIES TO CREDITOR'S BILL. — The liability of each stockholder upon his subscription to the capital stock of a corporation is several and not joint; and upon a creditor's bill by a judgment creditor who has exhausted his legal remedies against the corporation, to subject the amount due from the stockholders for unpaid subscriptions for stock to the payment of the judgment, it is not necessary that all of the stockholders should be made parties defendant.

ID. — EVIDENCE — PURSUIT OF STATUTORY LIABILITY — EXHAUSTION OF REMEDIES — RETURN OF EXECUTION UNSATISFIED. — It is not necessary for the judgment creditor of the corporation, who is seeking in equity to enforce payment of subscriptions to stock, to show that he had pursued his statutory remedy against the stockholders, and proof that the creditor had exhausted his legal remedies against the corporation is shown by the introduction in evidence of the judgment against the corporation with the return of the execution issued thereon unsatisfied.

ID. — CONCLUSIVENESS OF RETURNS — INADMISSIBLE EVIDENCE — PROPERTY SUBJECT TO EXECUTION. — The return of the execution issued upon the judgment as unsatisfied is conclusive, in the equitable action against the stockholders, that the creditor has exhausted his legal remedy upon the judgment; and evidence offered by the defendants for the purpose of showing that the corporation was the owner and in the possession of a large amount of personal property, which might have been levied upon, is properly rejected by the trial court.

ID. — CONCLUSIVENESS OF JUDGMENT — INADMISSIBLE ASSAULT BY STOCKHOLDERS. — DEBT OF CORPORATION ULTRA VIRES. — A judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of the creditor to subject its property to the satisfaction thereof; and in the absence of fraud is equally conclusive upon the stockholder, when it is sought to satisfy the judgment out of the assets of the corporation in his hands; and evidence offered by the stockholders in the action against them to show that the indebtedness for which the judgment against the corporation was recovered arose upon a contract which was *ultra vires*, is properly excluded by the trial court.

ID. — ACTS OF CORPORATION BINDING UPON STOCKHOLDERS IN ABSENCE OF FRAUD. — A corporation represents and binds its stockholders in all matters within the limits of its corporate powers, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts;

and with its right to maintain and defend actions concerning its corporate rights or liabilities, the stockholders cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action.

1a. — STOCK IN NAME OF DEFENDANT — LIABILITY OF HOLDER TO CREDITORS — INADMISSIBLE EVIDENCE — AGENCY FOR OWNERS. — One to whom stock is issued by a corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner, although he was in fact a pledgee, agent, or trustee for the real owner; and in an action against a stockholder to subject the amount due from him for unpaid subscriptions to stock to the payment of an unsatisfied judgment against the corporation, evidence is inadmissible to show that he was the real owner of only part of the shares issued to him by the corporation, and that the others standing in his name were owned by other parties, and were issued to him for the purpose of negotiating a loan for the real owners.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Hunsaker, Britt & Goodrich, for Appellants.

Under the common law and the law of this state, this action is not maintainable, and the demurrers to the complaint for want of facts should have been sustained. (*Sawyer v. Hoag*, 17 Wall. 610, 620; *Thompson on Liability of Stockholders*, sec. 10; *Cook on Stock and Stockholders*, 2d ed., sec. 199; *Wood v. Dumner*, 3 Mason 308; *Gray v. Coffin*, 9 Cush. 199; *Salt Lake City Bank v. Hendrickson*, 40 N. J. L. 54, 55; *Thomas v. Dakin*, 23 Wend. 95; *Alling v. Ward*, 24 N. E. Rep. 551; *French v. Teschemaker*, 24 Cal. 540; *In re South Mountain Consolidated Min. Co.*, 8 Saw. 366.) There is a defect of parties, as all the stockholders should have been made defendants. (*Mann v. Pentz*, 3 N. Y. 416-423; *Griffith v. Mangam*, 73 N. Y. 611, 612; *Adler v. Milwaukee P. B. M. Co.*, 13 Wis. 57-63; *Coleman v. White*, 14 Wis. 700-705; 80 Am. Dec. 797; *Umstead v. Buskirk*, 17 Ohio St. 113; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78; *Wellington v. Continental C. & I. Co.*, 5 N. Y. Supp. 588; *Thompson on Liability of Stockholders*, secs. 353, 361.) The indebted-

ness was upon a contract which was *ultra vires*, and therefore could furnish no ground for an action against the stockholder. (*Cox v. Gould*, 4 Blatchf. 341, 346; *Hall v. Auburn Turnpike Co.*, 27 Cal. 256; 87 Am. Dec. 75; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *Pearce v. Madison etc. R. R. Co.*, 21 How. 441; *City of St. Joseph v. Saville*, 39 Mo. 460; *Hoagland v. Hannibal etc. R. R. Co.*, 39 Mo. 451; *Sumner v. Marcy*, 3 Wood. & M. 105.) The judgment against the corporation did not preclude a defense by the stockholders. (*Neilson v. Crawford*, 52 Cal. 249; *McMahon v. Macy*, 51 N. Y. 155; *Miller v. White*, 50 N. Y. 142; *Southmayd v. Russ*, 3 Conn. 52, 57.) The return of the sheriff upon the execution was not conclusive evidence of the insolvency of the corporation, and of the exhaustion of the creditor's remedy. (Pol. Code, sec. 4178; 2 Freeman on Executions, sec. 365; *Walker v. Sedgwick*, 8 Cal. 398.) The defendant Babcock should have been permitted to show that he did not own the shares of stock standing in his name. The books of the company were at most only *prima facie* evidence in this regard. (*Mudgett v. Horrall*, 33 Cal. 25. See *McMahon v. Macy*, 51 N. Y. 161; *Parrott v. Byers*, 40 Cal. 614.) The equitable title remained in the parties for whom Babcock was trying to borrow the money. (*Broadway Bank v. McElrath*, 13 N. J. Eq. 26.) And they were the persons who, as regards this amount of stock, constituted the stockholders liable for the debt of plaintiff. (*Larrabee v. Baldwin*, 35 Cal. 166.)

Works, Gibson & Titus, and Sprigg & Barber, for Appellants.

Originally, in this state, both the equitable liability of stockholders and a statutory liability similar to the present one were expressly provided for by statute (Stats. 1850, p. 347, sec. 4); but in the codes but one of these liabilities, viz., the statutory one, has been provided for (Civ. Code, sec. 322); and therefore it is quite clear that it was intended by the law-makers that the liability of

stockholders provided by the statute should be their whole liability. (*State v. Conkling*, 19 Cal. 501, 512; *Jessup v. Carnegie*, 80 N. Y. 442; 36 Am. Rep. 643; *Mills v. Stewart*, 41 N. Y. 389.) The right to resort to unpaid subscriptions of stock was held to be a substitute for the personal liability which subsists in private copartnerships. (*Sanger v. Upton*, 91 U. S. 56, 60.) And the equity remedy was allowed, because at common law the stockholders were not personally liable for the debts of the corporation. (Thompson on Liabilities of Stockholders, sec. 11.) But in this state an absolute personal liability which can be enforced at law having been provided for, this substitute therefor is no longer necessary, and should not be allowed, at least until this legal remedy has been exhausted, and has failed to bring the creditor his money. (*Lowry v. Inman*, 46 N. Y. 119; *Shaw v. Boylan*, 16 Ind. 384; *Allen v. Walsh*, 25 Minn. 543, 556; *Mansfield etc. Works v. Willcox*, 52 Pa. St. 377; *Hoard v. Willcox*, 47 Pa. St. 51; Cook on Stockholders, sec. 220; *Adler v. Milwaukee etc. Mfg. Co.*, 13 Wis. 63; *Taylor v. Bowker*, 111 U. S. 110; 4 Am. & Eng. Ency. of Law, 574.) It is not shown that the legal remedy was exhausted simply because the execution against the corporation was returned *nulla bona*, as not only are the stockholders primarily liable, but they are jointly and severally liable, and the creditor may maintain an action against the stockholders without attempting to make his debt out of the corporation. (Const., art. XII., sec. 3; Civ. Code, sec. 322; *Mokelumne C. & M. Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646; *Prince v. Lynch*, 38 Cal. 530; 99 Am. Dec. 427; *Sonoma Valley Bank v. Hill*, 59 Cal. 109; *Morrow v. Superior Court*, 64 Cal. 383; *Hyman v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178.) The court below erred in finding that other stockholders than those sued were not necessary parties. The rule is well settled that in an equitable proceeding of this kind the suit is for the benefit of all the creditors, and that all the stockholders are necessary parties defendant.

(Cook on Stock and Stockholders, secs. 205, 206; *Allen v. Walsh*, 25 Minn. 543, 553; *Pollard v. Bailey*, 20 Wall. 520; Morawetz on Corporations, sec. 866; Thompson on Liability of Stockholders, sec. 353; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Griffith v. Mangam*, 73 N. Y. 611; *Adler v. Milwaukee etc. Co.*, 13 Wis. 63; *Patterson v. Lynde*, 112 Ill. 196; *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 N. H. 371; *Thompson v. Reno Savings Bank*, 19 Nev. 103; 3 Am. St. Rep. 815.) The court erred in refusing to allow the defendants to prove that the corporation had property subject to execution out of which the debt could have been made, as the return of the execution *nulla bona* was not conclusive as to the insolvency of the corporation. (*Windhaus v. Bootz*, 25 Pac. Rep. 404; *Crouse v. Bailey*, 10 N. Y. Supp. 273; *Walker v. Sedgwick*, 8 Cal. 403; *Harris v. Taylor*, 15 Cal. 348; *Lee v. Orr*, 70 Cal. 398.)

Brunson, Wilson & Lamme, also for Appellants.

A legal change of the corporate purposes will absolve the stockholder from his liability upon his subscription to the capital stock (*Angell & Amas on Corporations*, sec. 537; *Banet v. Alton & Sangamon R. R. Co.*, 13 Ill. 508; *Pennsylvania etc. Canal Co. v. Webb*, 9 Ohio, 136; *Union Locks and Canals v. Towne*, 1 N. H. 44; 8 Am. Dec. 32; *Middlesex Turnpike Co. v. Swan*, 10 Mass. 384; *Burrows v. Smith*, 10 N. Y. 550; *Marrietta etc. R. R. Co. v. Elliott*, 10 Ohio St. 57; *Woodhouse v. Commonwealth Ins. Co.*, 54 Pa. St. 307; *Hester v. Memphis etc. R. R. Co.*, 32 Miss. 378; *McCullough v. Moss*, 5 Denio, 580; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 607; *Plank Road Co. v. Lapham*, 18 Barb. 315); and therefore a wholly illegal and *ultra vires* one will do so, particularly when the creditor knew of the illegal and *ultra vires* acts. A corporation represents and binds the share-holder only in such matters as are within the limits of the corporate powers. (*Green's Brice's Ultra Vires*, 2d Am. ed., 77-467, and notes; *Railway v. Allerton*, 18 Wall. 233.)

Frank W. Burnett, for Respondent.

This action is clearly maintainable. (*Harmon v. Page*, 62 Cal. 448-464; *Hatch v. Dana*, 101 U. S. 885; Cook on Stockholders, sec. 199, and cases cited; *Sawyer v. Hoag*, 17 Wall. 610-620; Morawetz on Corporations, secs. 820, 821.) It was not necessary to make all of the stockholders parties defendant. (*Hatch v. Dana*, 101 U. S. 205; *Brundage v. Monumental Gold etc. Co.*, 12 Or. 322. See also, of the later cases, *Thompson v. Reno Savings Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; *Samaingo v. Stiles*, 20 Pac. Rep. 607 (Ariz.); *Cornell's Appeal*, 114 Pa. St. 153; Cook on Stockholders, note to sec. 206.) The claim that the judgment was rendered for indebtedness contracted *ultra vires* is no defense to the action. (Cook on Stockholders, sec. 187, 188.) The judgment is conclusive in this action. (Cook on Stockholders, sec. 209; Morawetz on Corporations, sec. 865, 886; Thompson on Stockholders, sec. 329; *Slee v. Bloom*, 20 Johns. 669.) As the defendant Babcock was the legal holder of the stock transferred to him, he is liable in this action, and not the equitable owner. (Cook on Stockholders, sec. 245; Morawetz on Corporations, secs. 852-854.)

Myrick & Deering, also for Respondent.

The code has not taken away the creditor's right to resort to unpaid subscriptions to the stock of the corporation. (*Harmon v. Page*, 62 Cal. 448; 1 Pomeroy's Eq. Jur. secs. 276 et seq.) The reason for subjecting the unpaid subscriptions to the payment of judgment creditors is not because there was formerly no resort to the stockholders personally, but because the unpaid subscriptions were a trust fund belonging to the corporation. (Thompson on Liability of Stockholders, sec. 18; Cook on Stockholders, sec. 200.) The creditor need not sue the stockholder on his statutory liability before resorting to the unpaid subscriptions. (Thompson on Liability of Stockholders, sec. 265; 2 Morawetz on Corporations, sec. 866.) Neither was it necessary to make all of the

stockholders parties defendant. (*Hatch v. Dana*, 101 U. S. 205, 210-211; *Hill v. Merchants' Ins. Co.*, 134 U. S. 515, 527.) It was not error for the court to refuse to allow the defendants to prove that the corporation had property subject to execution out of which the debt might have been made, as the return was conclusive. (*Jones v. Green*, 1 Wall. 330, 332; *Cook on Stockholders*, 2d ed., pp. 208, 209.) The judgment is conclusive upon the stockholders. (*Cook on Stockholders*, sec. 209.) And the return upon the writ of execution becomes part of the record, and is entitled to the same weight as evidence. (2 *Freeman on Executions*, 2d ed., sec. 363; *Bank of U. S. v. Dallam*, 4 Dana, 574, 579; *Pigot v. Davis*, 3 Hawks, 25; *Jones v. Green*, 1 Wall. 330, 332.)

McNealy, Trippett & Neale, and *M. S. Babcock*, also for Respondent.

The COURT.—This cause was submitted in Department, and a decision was rendered therein, affirming the judgment, on September 23, 1891. Thereafter, on petition of appellants, a rehearing was granted, and the cause was submitted in Bank.

We have given to the arguments and briefs of counsel and the cases therein cited, careful attention and consideration, and are satisfied with the opinion and conclusion of Department Two. Some of the points might be more elaborately discussed and additional authorities cited in support of the conclusions reached, but we deem it unnecessary to do so.

For the reasons given in the opinion of Mr. Justice De Haven, in Department, the judgment and order are affirmed.

HARRISON, J., dissented.

The following is the opinion above referred to, rendered in Department Two, on the 23rd of September, 1891:—

DE HAVEN, J.—This is an action to subject the amount due from defendants for unpaid subscriptions for stock in the San Diego Street-Car Company to the payment of a judgment in favor of plaintiff, and against said corporation. The findings of the court, following the allegations of the complaint, show that execution was issued upon this judgment, and by the sheriff returned unsatisfied, because he could find no property of the corporation to apply to the satisfaction thereof. It is also alleged and found that the officers of the corporation have neglected and refused to make any assessment upon its stock, or to collect the balance remaining unpaid upon subscriptions for its stock. The plaintiff recovered judgment, and from this, and an order denying their motion for a new trial, the defendants appeal.

1. It is well settled that a judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. The action is sustained upon the principle that such unpaid subscriptions are a part of the capital stock of the corporation, and, like other debts due to it, constitute a fund to which creditors may look for the payment of their claims; and when the corporation neglects to call them in, a court of equity will enforce their payment. (*Sanger v. Upton*, 91 U. S. 56.) The contention of appellants, that this equitable remedy is superseded in this state by section 322 of the Civil Code, and that the only personal liability of the stockholder is that fixed by that section, is not tenable, and was so held by this court in *Harmon v. Page*, 62 Cal. 448. The remedy given by that section of the code is purely statutory and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebted-

edness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.

2. All the stockholders were not made parties defendant, and the objection to their non-joinder was taken both by demurrer and answer. The objection is not well taken, although the rule contended for by appellants finds support in some of the decided cases. The precise question arose in the case of *Hatch v. Dana*, 101 U. S. 205; and it was there held, in an opinion the reasoning of which seems to us to be conclusive, that it is not necessary that all the stockholders should be made defendants in this kind of an action. The court there say: "The liability of a stockholder for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. . . . It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property,—that is, out of its unpaid stock,—there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes." And this rule is followed by other courts. (*Thompson v. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; *Bartlett v. Drew*, 57 N. Y. 587; *Brundage v. Mining Co.*, 12 Or. 322.)

3. It was not necessary for plaintiff to show that he had pursued his statutory remedy against the stockholders. The rule is, that a creditor has a right to resort to the equitable remedy invoked by the plaintiff in this action after he had exhausted his legal remedies against the corporation, and this was shown in this case by plaintiff's judgment, and the return of the execution issued thereon unsatisfied.

4. The court did not err in refusing to allow defendants to show that the corporation was the owner and in possession of a large number of street-cars and other personal property, and a line of street-railway and of valuable franchises within the city of San Diego. The purpose of this offered evidence was to show that plaintiff had not exhausted his legal remedy upon his judgment, but was not competent for that purpose. The rule upon this point is thus stated by Mr. Justice Field in *Jones v. Green*, 1 Wall. 332: "The court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows the remedy afforded at law has been pursued, and of course is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy."

5. The appellants offered to show that the indebtedness for which plaintiff's judgment against the corporation was recovered arose upon a contract which was *ultra vires*. The evidence was excluded, and this ruling is assigned as error. The question is thus presented, whether such judgment is conclusive upon the stockholders of the corporation in this action, and that it is we entertain no doubt. The object of this suit is to compel the corporation against whom the judgment was recovered to satisfy the same out of its assets, and it is not competent for the defendants, who are simply called

upon to pay what they owe to the corporation in order that its obligations may be discharged, to reopen the question whether, upon the facts, the plaintiff ought to have had judgment against the corporation. The judgment was a conclusive determination of that fact as against the corporation and all persons in privity with it, and carries with it, without relitigating the facts upon which it is based, the undoubted right of enforcement against the property of the corporation, and that is all that is sought in this case. A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. The right to sue and be sued, to maintain and defend actions concerning corporate rights and corporate liabilities, is a power incident to every corporation. In this state it is not only conferred by statute, but is preserved by constitutional provision. (Const., art. XII., sec. 4.) And with this right of the corporation to maintain and defend actions concerning its corporate rights or liabilities the stockholder cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action. (*Newby v. Railroad Co.*, 1 Saw. 63; *Memphis City v. Dean*, 8 Wall. 73; *Ware v. Bazemore*, 58 Ga. 316; *Greaves v. Gouge*, 69 N. Y. 154; *Brewer v. Boston Theatre*, 104 Mass. 378.) It must necessarily follow, from the nature of this corporate power, that a judgment against a corporation for alleged corporate indebtedness is conclusive upon it, and of the right of the creditor to subject its property to the satisfaction thereof; and, in the absence of fraud, equally conclusive upon the stockholder when it is sought to satisfy the judgment out of the assets of the corporation in his hands. This was so held in *Marsh v. Burroughs*, 1 Woods, 471. Mr. Justice Bradley, in delivering the opinion of the court in that case, said: "The stockholders of the bank can-

not ask to go behind the judgments rendered against the bank and question the original cause of action, unless they can show collusion between the plaintiff and the bank, entered into for the purpose of defrauding the stockholders." And this view is also sustained by the following cases: *Glenn v. Williams*, 60 Md. 93; *Henry v. Elder*, 83 Ga. 347; *Lehman v. Glenn*, 87 Ala. 618; *Stephens v. Fox*, 83 N. Y. 317; *Bank v. Chandler*, 19 Wis. 435. See also Morawetz on Private Corporations, sec. 865.

6. The appellant Babcock offered to show upon the trial that he was the real owner of only 425 of the shares issued to him by the corporation, and that the others standing in his name on its books were owned by other parties, and that they were issued to him as a matter of convenience to enable him to negotiate a loan for such owners. The evidence was excluded, and in our opinion, the ruling was correct. It seems to be well settled that one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner; and this whether he was in fact a pledgee, agent, or trustee for the real owner. (*Bank v. Case*, 99 U. S. 631; Cook on Stockholders, secs. 249-253; Thompson on Stockholders, sec. 223; *Thompson v. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797.) The foregoing views dispose of all the questions presented by this appeal requiring special discussion.

Judgment and order affirmed.

BEATTY, C. J., and McFARLAND, J., concurred.

XCV. CAL.—88

[No. 20945. In Bank. — August 11, 1892.]

THE PEOPLE, RESPONDENT, v. JOHN McNULTY. APPELLANT.

APPEAL — DISMISSAL — FRIVOLOUSNESS. — An appeal will not be dismissed upon motion therefor, upon the ground that it is frivolous. To dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit.

ID. — APPEAL IN CRIMINAL CASE — GROUNDS OF DISMISSAL. — Under section 1248 of the Penal Code, the supreme court is forbidden to dismiss an appeal in a criminal case, unless the appeal itself is irregular in some substantial particular, to be determined by reference to the order or judgment appealed from, and the steps taken to perfect the appeal.

ID. — APPEALABLE ORDER — CRIMINAL LAW — HOMICIDE — ORDER FIXING TIME AND PLACE FOR EXECUTION. — An order made after the affirmance of a capital conviction, fixing the time and place of execution, is an appealable order, and an appeal therefrom cannot be considered upon its merits upon a motion to dismiss, or be dismissed upon the ground that it is frivolous.

ID. — STAY OF EXECUTION — CERTIFICATE OF PROBABLE CAUSE. — An appeal from such order does not *ipso facto* stay the execution of the sentence; but in order to effect such a stay, a certificate of probable cause for the appeal must be obtained from either a judge of the trial court or of the appellate court.

MOTION to dismiss an appeal from an order made after the affirmance of a capital conviction fixing the time and place of execution. The facts are stated in the opinion of the court.

Carroll Cook, and *J. E. Foulds*, for Appellant.

Attorney-General W. H. Hart, for Respondent.

BEATTY, C. J.—The defendant in this case was convicted of murder in the first degree, and sentenced to suffer death. He appealed from the judgment of conviction, which was finally affirmed by this court in February last. Upon the going down of the *remittitur*, the superior court made an order fixing the twelfth day of August, 1892, as the time and the county jail of San Francisco as the place, of execution of the judgment. From this order the defendant, on the eighth day of August, served and filed his notice of appeal. The people now move to dismiss the appeal, upon the ground that it is frivolous.

This is not an appeal from the judgment of conviction, but only an appeal from the order last above mentioned, made and entered on June 17, 1892, and the fact that said order is designated in the notice of appeal as a judgment does not make it an appeal from the judgment of conviction which was made and entered more than three years before this last appeal was taken. An appeal from the judgment in a criminal case must be taken within one year after its rendition. (Pen. Code, sec. 1239.)

This, then, is an appeal taken under subdivision 3 of section 1237 of the Penal Code, which allows the defendant in a criminal action to appeal "from any order made after judgment affecting the substantial rights of the party."

In *People v. Sprague*, 54 Cal. 92, and in two subsequent cases decided by this court, it has been held that an order made after affirmance of a capital conviction fixing the time and place of execution is one of the orders included by said subdivision. There can be no doubt of the correctness of this view, and it therefore follows that this defendant had a right to take and to prosecute this appeal.

Can it be dismissed upon the ground that it is frivolous?

To dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered, and the record must be examined.

The motion, therefore, is in terms self-contradictory, and must be viewed in its real character as a motion for a summary hearing of the appeal and affirmance of the order of the superior court. This conclusion seems to be inevitable upon the grounds stated, but if it were not, the statutory provision makes it so.

By section 1248 of the Penal Code it is expressly provided as follows: "If the appeal is irregular in any substantial particular, but not otherwise, the appellate court

may on any day, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed." By this provision the supreme court is forbidden to dismiss an appeal in a criminal case unless the appeal itself is irregular in some substantial particular, and this is to be determined by reference to the order or judgment appealed from, and the steps taken to perfect the appeal. Looking to this order, notice of appeal, etc., we find an appealable order and notice of appeal therefrom substantially and formally sufficient, regularly served and filed, and in due time. The appeal, therefore, cannot be dismissed without a plain violation of the express inhibition of the statute.

Nor can we consider and determine the appeal upon its merits upon this motion and in this summary manner. The record is not before us, and the cause is not brought to a hearing in accordance with the rules of practice of the court, nor pursuant to any order modifying or dispensing with such rules.

The *argumentum ab inconvenienti*, so strongly insisted upon by the attorney-general as a reason for putting a different construction upon the above-quoted provision of the Penal Code relative to the dismissal of appeals in criminal cases, is without any force, for the simple reason that the inconvenience suggested cannot possibly arise. He says that unless such an appeal as this can be summarily dismissed upon the ground that it is frivolous, it will be in the power of every person condemned to death to delay the execution of the sentence again and again, as often as he chooses, by the simple expedient of taking an appeal from each successive order appointing the time and place of execution so short a time before the date of execution as to preclude the hearing of the appeal before the day has passed.

This argument assumes that the taking of the appeal *ipso facto* stays the execution of the sentence. But the assumption is contrary to the express provision of the statute. Section 1243 of the Penal Code is as follows:

"An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such courts, or of a justice of the supreme court, that in his opinion there is probable cause for the appeal, but not otherwise."

It is clear from a reading of this section that it is only the appeal from the judgment of conviction, which, as we have seen, must be taken within one year after its rendition, that stays the execution *proprio vigore*. In case of any other appeal, such, for instance, as this appeal from an order after judgment, the mere appeal has no effect in staying execution, unless the judge of the superior court or a justice of this court will grant a certificate of probable cause for the appeal. This, of course, involves an examination of the original record or a copy by the judge to whom the application is made, and is the regular and only method prescribed by the statute for a determination whether the appeal is frivolous. In pursuing this method, the *onus* rests upon the appellant to convince the judge of the superior court or one of the justices of this court that there is some merit in his appeal. If he cannot,—if his appeal is clearly frivolous,—no certificate will be granted, and there will be no stay. This being so, there is no occasion in such case for the people to assume the laboring oar, and on motion to dismiss the appeal, show that it is frivolous.

Motion denied.

DE HAVEN, J., HARRISON, J., SHARPSTEIN, J., and GAROUTTE, J., concurred.

McFARLAND, J., dissenting. — I dissent. I think that the papers submitted show upon their face that they constitute a mere confessed attempt to take a second appeal from the judgment, and should be so considered. The appeal should, in my opinion, be dismissed.

[No. 15004. Department Two. — August 12, 1892.]

HENRY GUTZEIL, RESPONDENT, v. JAMES O. PENNIE ET AL., APPELLANTS.

UNDERTAKING ON APPEAL — EXECUTION BY FOREIGN SURETY CORPORATION — AUTHORITY OF OFFICERS. — An undertaking upon appeal, executed by a foreign surety corporation, and signed in behalf of the corporation surety by its second vice-president and its assistant secretary, with the seal of the corporation affixed, will not be declared void, as not being properly signed, where there is nothing to show that such officers were not authorized to sign and deliver it.

ID. — AUTHORITY OF FOREIGN CORPORATION TO TRANSACT BUSINESS — CERTIFICATE OF INSURANCE COMMISSIONER — DISMISSAL OF APPEAL. — A motion to dismiss an appeal upon the ground that the undertaking was executed by a foreign surety corporation which had not filed with the secretary of state a designation of some person residing in this state upon whom service of process could be made, as required by the act of April 1, 1872 (Stats. 1871-72, p. 826), will be denied, where it appears from the certificate of the insurance commissioner of this state that the surety corporation is duly authorized to transact business in this state.

ID. — EFFECT OF CERTIFICATE — PRESUMPTION. — There is a presumption that the insurance commissioner properly performed his official duty in issuing the certificate, and such certificate is *prima facie* evidence that the surety company has complied with section 616 of the Civil Code, though it does not expressly so state.

ID. — CONSTRUCTION OF CODE — DESIGNATION OF AGENT OF FOREIGN SURETY CORPORATION — FILING IN OFFICE OF INSURANCE COMMISSIONER — STATUTE OF LIMITATIONS. — Section 1056 of the Code of Civil Procedure, giving the insurance commissioner the same jurisdiction and powers to examine the affairs of a surety corporation as he has in other cases, and requiring him to file similar statements and issue similar certificates, and section 616 of the Political Code, providing that the commissioner is not authorized to issue such a certificate to a foreign insurance company until it has first filed in his office "the name of an agent and his place of residence in this state, on whom summons and other process may be served in all actions or other legal proceedings," apply to a foreign surety company; and when such a corporation has filed with the insurance commissioner the designation required by section 616, that is all that is required of it in the matter of naming an agent upon whom process may be served, to entitle it to do business in this state, although the failure to file such designation with the secretary of state might deprive it of the benefit of the statute of limitations, as provided by the second section of the act of April 1, 1872.

MOTION to dismiss an appeal from the Superior Court of Santa Clara County. The facts are stated in the opinion of the court.

Barker & Leib, for Appellants.

Eugene N. Deuprey, W. L. Gill, and J. R. Patton, for Respondent.

DR HAVEN, J.—The undertaking on appeal herein was executed by the American Surety Company, a foreign corporation, and the respondent moves to dismiss the appeal, upon the ground that the undertaking is not properly signed, and upon the further ground that the corporation has not filed with the secretary of state a designation of some person residing in this state upon whom service of summons may be made, as required by the act relating to foreign corporations, approved April 1, 1872. (Stats. 1871-72, p. 826.)

1. The undertaking is signed in behalf of the corporation surety by its second vice-president and its assistant secretary, and has affixed to it the seal of the corporation. There is nothing before us to show that these officers were not authorized to sign and deliver the undertaking, and we cannot, therefore, hold that the undertaking is void because not properly signed.

2. The corporation has never filed with the secretary of state a paper designating the person upon whom service of process can be made for it in this state, as required by the act of the legislature above referred to; but it appears from the certificate of the insurance commissioner for this state that "the American Surety Company of New York City, New York, is duly authorized to transact business in this state, and has been so authorized since December 5, 1884." It is provided by section 1056 of the Code of Civil Procedure that in respect to corporations organized for the purpose of becoming surety on bonds or undertakings authorized by law, "the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; [and] shall require them to file similar statements, and issue to them a similar certificate."

The certificate referred to in this section is one that the

corporation is authorized to transact business in this state, and the insurance commissioner is not authorized to issue such a certificate to a foreign insurance company until it has first filed in his office "the name of an agent and his place of residence in this state, on whom summons and other process may be served in all actions or other legal proceedings against such corporation or company." (Pol. Code, sec. 616.) We think that under section 1056 of the Code of Civil Procedure this provision of section 616 of the Political Code also applies to corporations like that executing the undertaking on appeal in this case, and that when such corporation has filed with the insurance commissioner the designation required by this section of the Political Code, that is all that is required of it in the matter of naming an agent upon whom process in actions against it may be served, to entitle it to transact business in this state, although the failure to file such designation with the secretary of state might deprive it of the benefit of "the statutes of this state limiting the time for the commencement of actions," as provided by the second section of the above-mentioned act of April 1, 1872.

The certificate of the insurance commissioner, filed by the appellant herein, while it does not expressly state that the American Surety Company has complied with section 616 of the Political Code, is at least *prima facie* evidence that it has done so. There is a presumption that the insurance commissioner properly performed his official duty in issuing this certificate, and in the absence of any evidence showing that this certificate was issued under circumstances not authorized by law, the certificate will be regarded as sufficient proof that it was properly issued, and that, as stated above, the American Surety Company had and has authority to transact business in this state. If, in fact, that corporation has not complied with the section of the Political Code above referred to, the respondent will be permitted to renew his motion, and show that the certificate was improperly

issued, but upon the facts now before us, the motion to dismiss the appeal must be denied.

Motion denied.

SHARPSTEIN, J., and McFARLAND, J., concurred.

[No. 14725. Department Two. — August 12, 1892.]

RECLAMATION DISTRICT No. 124, RESPONDENT,
v. R. A. GRAY, APPELLANT.

RECLAMATION DISTRICT — ACTION TO RECOVER ASSESSMENT — VALIDITY OF
DE FACTO ORGANIZATION — ACTS OF OFFICERS LEVYING ASSESSMENT.

— In an action to recover an assessment levied upon land by a *de facto* reclamation district, the defendant cannot collaterally question the validity of the organization of the district, or of the acts of the board of trustees and commissioners in using data in the nature of evidence furnished by surveys, estimates, and reports considered by them as to the assessment of lands in the district, not invalidating their acts, otherwise legal, in levying the assessment sued upon.

1D. — LEGISLATIVE VALIDATION OF DISTRICT — PROOF OF CORPORATE EXISTENCE — VALIDITY OF ASSESSMENT. — An act of the legislature purporting to legalize and validate a reclamation district is conclusive proof, in an action to recover an assessment upon lands in the district, of the existence of the corporation from the time of the passage of the act, and an assessment levied thereafter in accordance with the statute having reference to the organization of the district is valid and enforceable.

1D. — PUBLIC CORPORATION — CREATION BY SPECIAL ACT OF LEGISLATIVE RECOGNITION. — A reclamation district is a public corporation, which can be created not only by the means and in the manner provided by the general law, but also by special act or implication. Legislative recognition is in many cases sufficient proof of its existence.

APPEAL from a judgment of the Superior Court of Colusa County.

The facts are stated in the opinion.

H. M. Albery, for Appellant.

As the board of supervisors had no jurisdiction to approve the petition for the organization of the district, the district is not a corporation, *de facto* or otherwise, and cannot, therefore, levy assessments and collect taxes for corporation purposes. (*People v. Haggin*, 57 Cal.

585; *District No. 110 v. Feck*, 60 Cal. 405; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 642; *Williams v. Sacramento Co.*, 58 Cal. 238.) As the board of supervisors had no jurisdiction, it never formed any district, and therefore the act of 1874 was of no avail as a curative statute. (Cooley's Const. Lim., 2d ed., 371, 383; *Tifft v. City of Buffalo*, 82 N. Y. 211; 1 Dillon on Municipal Corporations, 4th ed., sec. 77; *Maxwell v. Goetschius*, 40 N. J. L. 383; 29 Am. Rep. 242; *Kimball v. Town of Rosendale*, 42 Wis. 407; 24 Am. Rep. 423; *Richard v. Rote*, 68 Pa. St. 248; *Boice v. City of Plainfield*, 38 N. J. L. 95; *Pryor v. Downey*, 50 Cal. 404; 19 Am. Rep. 656; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Schumacker v. Tobernan*, 56 Cal. 508; *McDaniel v. Correll*, 19 Ill. 228; 68 Am. Dec. 587.) Clearly the legislative organization of the district dates only from the passage of the alleged curative statute. All the initial proceedings under which the present assessment is based were taken long prior to the passage of that statute. These proceedings were not validated by the statute, although it should be held that the district was a valid corporation from and after the passage of the statute. (*Mayor of Baltimore v. Horn*, 26 Md. 194; *Denny v. Mattoon*, 84 Mass. 383; and see *Lennon v. Mayor etc.*, 55 N. Y. 365.)

W. G. Dyas, amicus curiæ, also for Appellant.

Adams & Adams, for Respondent.

Even if the action of the board of supervisors was irregular in any respect, the act of March 30, 1874, legalized the district. (*People v. Rec. Dist. No. 108*, 53 Cal. 346; *Jamison v. People*, 16 Ill. 257; *People v. Farnham*, 35 Ill. 562; Angell and Ames on Corporations, sec. 77; Boone on Corporations, sec. 16.) The corporate acts of the district prior to the passage of the validating act of March 30, 1874, were each and all valid, whether the district, before such validating act, is deemed to have been a *de jure* or a *de facto* corporation, and are now be-

yond question, in any manner, or in any proceeding, direct or otherwise. (*People v. La Rue*, 67 Cal. 530.)

FOOTE, C. — This action was brought to recover an assessment levied upon the land of Mr. Gray by the commissioners of assessment of an alleged reclamation district in the county of Calaveras. The complaint was demurred to, on the grounds that the plaintiff had no authority to sue, because it had never been legally formed or organized by the board of supervisors, to whom the petition for said formation had been presented, in that the said board in approving the petition found that certain lands embraced in the proposed district had been *improperly included* therein, and that therefore such approval was void.

The second ground of demurrer is, that the complaint does not state facts sufficient to constitute a cause of action, because it appears from the face of the complaint that the reclamation district was never legally formed or organized, for the reason that upon the petition presented to the board of supervisors that body found that certain of the lands embraced in the petition for the formation of the district were improperly included, and because of such finding of improper inclusion, the approval of the petition by the board, "in the manner and in the terms set forth in said complaint, was without authority of law, illegal, and void"; that an act of the legislature purporting to legalize and validate the reclamation district only validated, if at all, the district as of the date of the approval of the act, validated no act of the board of supervisors or of the board of trustees of the district done anterior to the passage of that act, and particularly the acts of the trustees with reference to making by-laws, employing engineers to survey, plan, locate, and estimate the cost of the works necessary for reclamation, and in reporting such estimates to the board of supervisors and asking for the appointment of commissioners of assessment, and also that the order of the board of supervisors in appointing such commis-

sioners was illegal and void, etc.; that the assessment sought in this action to be enforced was based upon the plans and estimates of the board of trustees presented to the board of supervisors, and upon an order of that board appointing commissioners of assessment anterior to the approval of the creation or validating act of the legislature set out in the plaintiff's complaint.

This demurrer was overruled, and the defendant declining further to answer, judgment as prayed for was given and made for the plaintiff, from which this appeal is taken.

The appellant contends that the board of supervisors had no right to approve the petition as they did; that the statute did not authorize such an approval; that the action of the board amounted to no approval at all, and that such approval was jurisdictional in its nature, and that hence there was no corporate existence, *de jure* or *de facto*, as to the reclamation district; that if there was no jurisdiction in the board of supervisors to organize the district, then the legislature did not validate its organization by the act passed, approved March 30, 1874; that assuming such act of the legislature did validate the organization of the reclamation district as of the date of the passage of the curative act, that such act could not validate the prior proceedings of the board of trustees and commissioners relative to the assessment on the lands of the reclamation district.

It may be conceded here, but not decided, that the action of the board of supervisors was illegal in approving the petition as they did, and yet it would not necessarily follow that the defendant here could impeach the validity of the organization of the reclamation district, or the acts of the board of trustees and commissioners as to the assessment of the lands in the district now under consideration. To do that is in the nature of a collateral attack on the organization of this district, and the acts of the trustees and commissioners. The question to be decided, then, is, Was this reclamation district in existence as a public corporation, *de jure* or *de facto*,

when the assessment was made, and was the assessment valid?

The district certainly was a public corporation from the date of the legislative act, for it was said in *People v. Reclamation District 108*, 53 Cal. 348, in relation to a matter similar to that raised here: "A corporation of this character is, as already stated, a public corporation. Such a corporation can be created not only by the means and in the manner provided by the general law, but also by special act or by implication of law. Legislative recognition of a corporation is in many cases sufficient proof of its existence." It is clear, at least, that by the passage of the act of March 30, 1874, the reclamation district in question has received the recognition of the legislature as such. And in such a proceeding as this, such action must be conclusive proof not to be gainsaid that the corporation existed from the time of such recognition. The assessment which it is sought here to enforce, was made after that date, and seems to have been made in accordance with the statute having reference to the organization of such district. If the board of trustees and commissioners used data furnished by surveys, estimates, and reports made before that time, this was in the nature of evidence considered by them, but does not invalidate their acts, otherwise legal, in levying the assessment. The cases cited by appellant, to the effect that if it appear from the complaint that no reclamation district, *de jure* or *de facto*, is shown to have existed when the assessment was made that a demurrer such as here involved should be sustained, are not in point, as we think.

For these reasons, we advise that the judgment be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

DE HAVEN, J., McFARLAND, J., SHARPSTEIN, J.

Hearing in Bank denied.

[No. 14696. Department Two. — August 12, 1892.]

**JOHANNA BALL, ADMINISTRATRIX, ETC., RESPONDENT,
v. PETER KEHL, APPELLANT.**

WATER RIGHTS — PRESCRIPTION — CONSENT TO USE FROM WASTE-GATE OF CANAL — NOTICE OF ADVERSE RIGHT — NONSUIT. — In an action to enjoin the closing of a waste-gate to defendant's canal, brought by a plaintiff who alleges a prescriptive right to open the waste-gate and divert water from the canal, when not used to run defendant's mill, a nonsuit is properly granted, where plaintiff's evidence shows that the waste-gate was habitually opened by defendant's express or implied consent, in response to an inquiry of plaintiff as to whether they desired to use the water, and does not disclose an uninterrupted adverse user of the water for a period of five years to the knowledge of defendant and his grantors, and with notice to them of a claim of right to open the waste-gate and take the water from the canal without their consent.

ID. — BURDEN OF PROOF AS TO PRESCRIPTIVE RIGHT. — The burden of proving uninterrupted user with knowledge of the owner is on the party claiming a prescriptive right.

ID. — INTERRUPTION OF USER. — An interruption of adverse user, however slight, prevents the acquisition of title by prescription.

ID. — PERMISSIVE USE OF WATER. — The use of water by permission of the owner is not adverse.

ID. — APPROPRIATION OF WATER FROM WASTE-GATE — SECOND APPROPRIATION OF STREAM. — An appropriation of so much water as the owner of the canal may elect to discharge from his waste-gate does not include the right to take water from the canal through the waste-gate by a trespass without the owner's consent; and such appropriation does not confer the same right as that of a second appropriation of the waters of a natural stream subject to the rights of a prior appropriator.

APPEAL — WAIVER OF FINDINGS — PRESUMPTION — FAILURE TO FIND UPON MATERIAL ISSUE. — Where the record upon appeal contains findings of fact and law, it cannot be presumed that a finding upon a material issue was waived; and a failure to find upon such issue is an error for which the judgment will be reversed.

ID. — OMISSION TO FIND AS TO ADVERSE USER. — Where the plaintiff claims a prescriptive right as the basis of an injunction, a finding upon the issue as to his adverse user is material, and a judgment in his favor cannot be supported without such finding where findings are not waived.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial.

The facts are stated in the opinion.

Willis, Cole & Craig, and *R. E. Houghton*, for Appellant.

H. C. Rolfe, and Rowell & Rowell, for Respondent.

VANOLIEF, C. — The object of this action is perpetually to enjoin the defendant from closing a certain waste-gate in his canal during all such times as he may not be using the water flowing in the canal for the purpose of propelling his grist-mill, — the plaintiff claiming a prescriptive right to divert the water from the canal through the waste-gate, for the purpose of irrigating his land, whenever the water is not being used by defendant for the purpose of propelling his mill.

It is alleged in the complaint that about thirty years before the commencement of this action, the grantor of the defendant constructed a canal about one mile in length, through which they diverted water from Warm Creek, and conducted the same to their grist-mill in the county of San Bernardino, for the purpose of propelling the machinery of said mill, but until within a few days before the commencement of this action never claimed or used the water for any other purpose; that, subject to the right of defendant to use the water for all purposes of running said mill, the plaintiff, during twelve years before the commencement of this action, appropriated, claimed, and used adversely to defendant, for irrigating his land, all the water discharged from said ditch through said waste-gate, at a point about one hundred yards above said mill, "whenever the said mill was not being run or operated." And also alleged that plaintiff "is the owner of the right to the use and flow of water from said canal for irrigation, agricultural, and domestic purposes as aforesaid, whenever the same is not needed for running said mill as aforesaid, and of the right to turn said water from said canal at the place of diversion, as hereinbefore stated." The complaint then proceeds as follows: "That heretofore, to wit, on or about the tenth day of August 1888, the defendant, without right, and while said mill was not being operated, nor the water of said canal needed or used for operating or running the same, closed the said gates in the side of said canal, and caused the

said water to flow down said canal and away from plaintiff's said premises and deprived plaintiff of the use thereof; and defendant has ever since said last-named date caused said gates to be closed, and deprived plaintiff of the use of any of said water, notwithstanding a great portion of the time the said water has not been used or needed to run said mill, and said mill has not been run or operated; and defendant threatens to continue so to deprive plaintiff of the use of any of said water at all times, even when said mill is not being run or operated, nor said water needed for running or operating the same."

After further alleging irreparable injury as the consequence of being deprived of the use of said water, the plaintiff prays "that defendant be perpetually enjoined from closing said gate, and from depriving plaintiff of the use or flow of the water of said canal through said opening, except at such times as said water may be needed and actually used for running and operating said mill."

The answer of defendant specifically denies each allegation of the complaint, except that defendant's grantors constructed and owned the canal and mill, and specifically denies any adverse appropriation or user of the water by the plaintiff or his grantors.

Upon certain issues of fact the court found for the plaintiff; and as a conclusion of law, found that plaintiff is the owner of the right to use water "from said canal through the first waste-gate on the west side of said canal, about one hundred yards above the defendant's grist-mill, at such times as the accustomed flow of the water in said canal is not used for the propulsion and operation of said grist-mill, or for purposes incidental to or necessary for the propulsion and operation of said grist-mill," and thereupon awarded the perpetual injunction prayed for.

Defendant's motion for new trial, made on a statement of the case, was denied, and he has appealed from the judgment, and from the order denying his motion.

1. Appellant contends that the court erred in denying his motion for nonsuit, made at the close of plaintiff's evidence in chief, on the ground that such evidence did not tend to prove any appropriation or user of the water in question, adverse to the defendant or his grantors.

The cause of action stated in the complaint, if any, is based upon plaintiff's alleged right to take water from defendant's canal without defendant's permission and against his will; and the burden of proving such right was upon the plaintiff; since, so far as alleged in the complaint, such right was denied. It is admitted in the complaint that the vendors of the defendant constructed the canal and appropriated the water of Warm Creek to run their mill; and it is not claimed and does not appear that the capacity of the canal is greater than necessary for that purpose while the mill is running. But it is claimed by plaintiff that the mill has not run all the time, and that, while it was not running, the defendant and his grantors had generally turned the water from the canal through a waste-gate about one hundred yards above the mill; and thence returned it to the creek through a ditch dug by themselves for that purpose; and all this appears to be true. But there was no evidence introduced by either party, before or after the motion for nonsuit, tending to prove that the plaintiff or his grantors ever, *to the knowledge of defendant or his grantors*, raised the waste-gate, or took a drop of water from the canal, without permission of the owner of the mill. It appears, however, that on some occasions when the mill was not running, the owners permitted plaintiff and others to raise the waste-gate and take water from the canal; and plaintiff's intestate—N. H. Ball—testified that on some occasions when the mill was not running, and when he could not find any one of the owners at or near the mill, he had raised the waste-gate and taken water from the canal. He said: "I have never been conceded the right to lift the waste-gate and turn the water away from the mill when the mill used it, by the previous owners or occupants of that

mill. I had raised the gate for years before when the mill was not running. I suppose that was conceded to me as a right. I never asked for permission, and they never gave it. I never asked any one to permit me to do it. I was not forbidden to do it on different occasions, for I never did it when they wanted it at the mill. I would know, because I would ask. I would frequently ask Mr. Davies when he wanted to grind or use the water, and if he did, I didn't meddle with it. . . . I admit, whenever they are working the mill, or working about the premises of the mill, they have a right to use this water, and I claim the right to use it when it is not necessary to run the mill. I suppose that necessity is determined by the owners of the mill; they know when they want to use it. . . . I never constructed any ditch from the waste-gate to my premises. I think the water flowed down whenever they chose to permit it, through the sluiceway to the head of the ditch that I now claim, or my reservoir. . . . During the time he [defendant] has been owner there [about four years], I don't know that I ever lifted that gate to let the water down, or lifted it at all. . . . I never asked his permission. I might have told my man to go and see if he wanted to grind, and if he didn't, to let the water come down. As I told you before, I didn't want the water when the mill wanted it. . . . I never knew the mill to run on Sunday, and Sunday is all the water I want. If they chose to run on Sunday, I wouldn't expect it. If the population here should increase, and the demand for the products of the mill increase so that it was compelled to run night and day to oblige customers, I would expect no water. I said that I have raised the gate from fifty to a hundred times,—I don't know how many times. It is not the case that on all these occasions I first obtained the permission and informed the parties operating the mill before doing so. I stated I often went to the mill to find out whether they needed the water prior to raising the gate. I often went there to see. I went up there to see if they

wanted to use it. It was times when the mill was not running, and Mr. Davies would let the water seep through, to keep the holes from drying up. I went up to see him, and if he didn't want to grind I would use it. If he wasn't there and wasn't grinding I would use it. I didn't claim to take it away from the mill when they wanted it, or claim any right to interfere with the mill."

According to Mr. Ball's testimony, he never claimed the right to take any water from the canal adversely to defendant or his grantors until about seventeen days before the commencement of this action. While he admits their right to use the water as they deemed necessary, and also to determine when its use by them was necessary, he does not state that they had notice that he ever took water from the canal without their consent, but only that he sometimes took it when he could not find any of the owners on or about the premises. He always sought the owners, and when he could find them, asked them whether they had any use for the water, before he took the liberty to raise their waste-gate. His own version of the circumstances under which he raised the waste-gate when the owners were present unmistakably indicates that he did so only by their consent. His inquiry as to whether they desired to use the water was evidently intended by him, and understood by them, to be a request on his part for permission to use it. Construing his testimony as liberally as possible in his favor, there is nothing in it tending to prove that the defendant or his grantors ever had notice that he claimed the right to take water from their canal without their consent.

Mr. Ball further testified that, after having used the waste water more than six years, he posted a written notice on the waste-gate, stating that he claimed "all the waste water flowing from the mill-race," and claiming "the right to divert said water at a point at the waste-gate of said mill-race, . . . and to conduct the same through a ditch and ditches to reservoirs, and to and

upon said lands [plaintiff's lands], *as has been heretofore done by me.*"

This notice was posted March 5, 1883, and Mr. Ball testified: "I do not know what became of that paper. . . . I should judge that it remained there a few months until the weather took it away, as far as I know." After posting this notice, plaintiff took and used the water as he had done during six years before, and not differently; and he always diverted the water from defendant's "mill-race," at a point more than three hundred feet below the waste-gate. There is no evidence that defendant's grantors ever saw the notice, except the fact that it was posted; and according to Mr. Ball's testimony, it was destroyed before defendant purchased the property. But conceding that defendant and his grantors saw it, they were thereby notified only that plaintiff claimed "*the waste water from the 'mill-race,'*" to be diverted and used *as it had been diverted and used by plaintiff* during six years before." The "mill-race" mentioned in the notice is the ditch dug by defendant's grantors to conduct the waste water from their waste-gate to the creek. Possibly the notice might have had the effect of giving plaintiff a right to all water discharged through the waste-gate and there abandoned by the defendant as waste water; but it contained nothing indicating that plaintiff claimed a right, under any circumstances, to divert water from defendant's canal without his permission.

Plaintiff acquired no right to open defendant's canal and take water from it, without defendant's consent, in consequence of the mere fact that defendant was not using the water at the time plaintiff took it. Such an opening of and taking water from defendant's canal was a trespass *ab initio* until after it had been openly and notoriously repeated and continued during a period of five years; and indeed, this seems to be the theory of the complaint. The motion for nonsuit raised the question whether or not the evidence substantially tends to prove that the trespass had been so committed and continued for a period of five years; and as above shown, it

would be a heavy strain upon the evidence to say that it substantially tends to prove that plaintiff was ever guilty of taking water from the canal, to the knowledge of defendant or his grantors, without their express or implied permission. However this may be, surely the evidence does not tend to prove that plaintiff continued so to take the water, even while it was not being used to run the mill, during a continuous period of five years.

The burden of proving uninterrupted user, with knowledge of the owner, is on the party claiming by prescription. (*American Co. v. Bradford*, 27 Cal. 361.) Interruption of adverse user, however slight, prevents acquisition of title by prescription. (*Cave v. Crafts*, 53 Cal. 135; *Alta Land Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217.) The use of water by permission of the owner is not adverse. (*Feliz v. Los Angeles*, 58 Cal. 74.)

The plaintiff, having failed to prove any right by prescription, can only have such right as he or his grantors acquired by appropriation of such waste water as defendant may elect to discharge through his waste-gate, which right does not include the right to take water from defendant's canal without his consent. (*Brown v. Mullen*, 65 Cal. 89). In this connection, it is to be observed that there is a plain and substantial distinction between the wrongful taking of water from the ditch or reservoir of another and the wrongful diversion of it from a natural stream before it enters the ditch or reservoir (*Heyne-man v. Blake*, 19 Cal. 579; *Parks Canal & M. Co. v. Hoyt*, 57 Cal. 44), corresponding with the common-law distinction between trespass *vi et armis* or *de bonis asportatis* and trespass on the case. For the purpose of diverting water from Warm Creek, it would not have been necessary to break defendant's canal, nor in any mode to take from it the water therein contained, which, being in defendant's possession and under his control, had become his personal property. Had the plaintiff claimed the right to divert water from Warm Creek, instead of the right to divert the water from defendant's canal, probably the relative rights of the parties might have been

determined by the rules announced in the cases of *Ortman v. Dixon*, 13 Cal. 34, and *Smith v. O'Hara*, 43 Cal. 371. But those cases are only partially applicable to the facts of this case. The plaintiff claims no right to take water from Warm Creek; and it is clear that he could have acquired no right to the water in defendant's canal by the mere diversion or appropriation thereof, involving, as it would, a trespass upon defendant's property. The only alleged right of the plaintiff is the right to divert water from defendant's canal, without his consent and against his will, at all times when it is not necessarily used by defendant to run his mill; and if acquired at all, this right could have been acquired only by uninterrupted adverse user during a period of five years. And conceding, for the sake of the argument only, that there was an adverse user during a part of the period of five years, this fact alone would not sufficiently tend to prove an adverse user during that whole period to entitle the plaintiff to recover.

2. But there is no finding upon the issue as to adverse user; and counsel for appellant contend that for this reason the decision is against law.

The only answer to this point by respondent's counsel is, that inasmuch as the record does not show that findings were not waived, it must be presumed that they were waived.

But where, as in this case, the record contains written findings of fact and law, the presumption contended for has never been indulged. In this case the judgment roll contains what purport to be findings of fact and law under the following recitals: "This case having been heretofore tried and submitted upon the pleadings, evidence, and briefs of counsel, the court finds the following facts."

Following this are four paragraphs of findings of fact; and under the heading "Conclusions of law" are four paragraphs of conclusions of law.

Under these circumstances, I think there is no pre-

sumption that a finding on the issue as to adverse user was waived.

I think the judgment and order should be reversed, and the cause remanded for a new trial.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

DE HAVEN, J., McFARLAND, J., SHARPSTEIN, J.

Hearing in Bank denied.

[No. 19067. In Bank. — August 13, 1892.]

SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT, v. FRANK DUFOUR, RESPONDENT.

WATER RIGHTS — PERCOLATING WATERS — APPROPRIATION OF SPRING — DIVERSION. — Where a spring is fed solely by percolating waters which seep into it from swamp or wet land surrounding the same, and not by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user, and no action will lie in favor of one who has collected the water at the spring in a reservoir, and transmitted it by a pipe for use, against one who has diverted the water from the reservoir by means of a tunnel and ditch, constructed above the reservoir on his own land, for irrigation and domestic use.

II. — SUBTERRANEAN WATERS PART OF SOIL. — The law controlling the rights to subterranean waters not running through a channel or defined course is very different from that affecting the rights of surface streams. In the former case the water belongs to the soil, is part of it, is owned and possessed as the earth is, and may be used, removed, and controlled to the same extent by the owner; and no action will lie for injuries caused by cutting it off.

III. — ACTION FOR DIVERSION — FINDING AS TO PERCOLATION — FAILURE TO FIND AS TO APPROPRIATION. — A finding, in an action for the diversion of water from plaintiff's reservoir, that the reservoir was sustained by percolating waters alone, and that the digging of the ditch by the defendant was for useful purposes upon his own land, and above the reservoir, is sufficient to sustain the judgment in favor of the defendant, and a failure to find upon the issue of appropriation does not constitute a reversible error.

FINDINGS — CONTROL OF JUDGMENT — FAILURE TO FIND. — Where the finding of a certain fact necessarily controls the judgment in an action, the failure of the court to find upon other issues does not constitute reversible error.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Joseph D. Redding, and J. E. Foulds, for Appellant.

Mahon & Laird, and J. A. Haralson, for Respondent.

GAROUTTE, J.—This is an action to restrain respondent from unlawfully diverting certain waters claimed to have been appropriated by appellant under the provisions of the Civil Code. Judgment went for defendant, and this appeal is prosecuted from the judgment and order denying the motion for a new trial. The findings of the court are not attacked, and the facts of the case may be briefly stated as follows: In the year 1888, Dufour acquired title to section 36 of a certain township, and range situated in Kern County. Prior to this event said realty was the property of the state. Upon this tract of land was a small tract of marsh or swamp land, in which the water came to the surface of the ground. As early as the year 1880 plaintiff made an excavation or reservoir some five feet in diameter in this marsh, in which the water collected, and from thence it was transferred in a small underground pipe a mile or more distant, to the railroad station of Cameron, where it was applied to the various uses of plaintiff. In the year 1886, plaintiff, in pursuance of sections 1410 et seq. of the Civil Code, posted a notice at the said reservoir, claiming five inches of said waters measured under a four-inch pressure; and it is under these acts and the foregoing provisions of the Code that plaintiff's rights are based. Prior to the commencement of this action, defendant made a tunnel into an adjoining hill, and dug a ditch in connection therewith (said acts being done upon his own

land), for the purpose of procuring water for irrigation and for his sheep. The action of defendant resulted in plaintiff's reservoir becoming dry and the water collecting in defendant's ditch, and this litigation followed.

The court found "that said spring (reservoir) in the complaint described was, on the seventh day of October, 1886, and for a long period of time prior to that date, and ever since such date has been and now is, fed solely by percolating waters which seep into said spring from the swamp or wet land surrounding the same, and such spring is not and never has been fed by any running stream of water." The finding is amply supported by the evidence, which clearly indicates that no stream of water runs into or from the bog or spring other than is conveyed away through plaintiff's pipe line. In the face of these facts, it is entirely immaterial whether the steps taken by plaintiff under the statute law of the state were strictly within the provisions of that law or not. There was no water at the spot to which plaintiff could acquire the right of use, either by statutory appropriation or adverse user, and this principle is supported by unquestioned authority. In *Trustees of Delhi v. Youmans*, 50 Barb. 316, the matter is exhaustively discussed, and Justice Boardman there said: "The law controlling the rights to subterranean waters is very different from that affecting the rights of surface streams. In the former case the water belongs to the soil, is part of it, is owned and possessed as the earth is, and may be used, removed, and controlled to the same extent by the owner." After citing many authorities, the opinion continues: "These and other cases establish the principle that no action will lie for injuries caused by cutting off subterranean channels percolating the soil or running through unknown channels and without a distinct or defined course."

The facts of this case place it entirely without any recognized exceptions to the foregoing rule, and bring it directly in line in all essential particulars with *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, where the principles declared in the case of *Trustees of Delhi v. You-*

mans are fully adopted; and this court went to the extent of saying, that, in the absence of any proof that the spring was supplied by any well-defined flowing stream, it would be presumed to be formed by the ordinary percolation of water in the soil. In this case, the court having found that the alleged spring or reservoir was fed by percolating waters alone, and the evidence disclosing that no stream of water whatever flowed naturally from the marsh or spring, it is apparent that title to the land carried title to the water, and plaintiff's acts of attempted appropriation created no right or easement, for no water was present which could be the subject of appropriation.

In addition to a specific denial of the allegations of the complaint, by the way of a special defense defendant set out that the water flowing from said spring formed a natural watercourse through defendant's land, and that he was entitled to the use of said water as a riparian owner. At the close of defendant's case he withdrew his special defense, and this action of counsel is assigned as error. Upon an examination of the record, we find no objection or exception taken to the withdrawal of this special defense from the answer, and hence do not perceive how it can be a proper subject for review. If plaintiff, relying on the allegations of the defense to cure a defective complaint, was surprised and misled by such action of counsel, upon a proper showing he would have been entitled to a continuance in order that he might amend his complaint or procure additional evidence, but there is nothing to indicate that he applied for such relief.

The complaint states that on the seventh day of October, 1886, the plaintiff appropriated the waters flowing into and from a certain spring (then follows the location of the spring), to the extent of five inches measured under a four-inch pressure. The answer contains a specific denial of this allegation, and the court found as a fact, and in the exact words of the complaint, that plaintiff did not on the seventh day of October, 1886, appropriate the waters flowing into and from a certain spring (then follows the location of the spring) to the extent of five

inches measured under a four-inch pressure. If the denial in the answer had been couched in the language of the finding, it would have fallen before objection, and the finding must likewise fall. It is evasive, and passes upon no material facts involved in the case. The pleadings presented the issue whether or not there was an appropriation of water. That was the ultimate fact, the heart of the case, and in response to that issue the court found that there was no appropriation of water upon the seventh day of October, 1886, to the extent of five inches measured under a four-inch pressure. The date of the appropriation and the amount of water appropriated were immaterial, and we are thus left without a finding as to the ultimate fact. Can this judgment stand, in the absence of a finding upon the question of appropriation? It was held in *Windhaus v. Bootz*, 92 Cal. 623, that where the finding of a certain fact necessarily controlled the judgment, the omission of the court to find upon other issues would not constitute reversible error, for findings upon such issues might be placed to the credit of the appellant and still the judgment stand. Upon this principle of law, respondent contends that the court having found that the spring was sustained by percolating waters only, other findings became unnecessary; for under the authority of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, such fact controlled the judgment in favor of respondent. Considered alone, this finding is not sufficient to accomplish such results, for it is not inconsistent with the fact that a natural stream of water flowed from the spring, which might be the subject of appropriation. But the finding that the spring was fed by percolating waters, taken in connection with the additional finding that the digging of the trench or ditch by defendant was for useful purposes, upon his own land and above the spring, inflexibly directs the course of the judgment to the respondent. Conceding that a natural stream of water flowed from the spring, which under *Ely v. Ferguson*, 91 Cal. 187, could be the subject of appropriation, still that fact did not create any barrier which would

prevent respondent from digging trenches upon his own land, even though the digging of such trenches resulted in the destruction of the spring as a source of water supply. If respondent's alleged diversion had been located by appellant at a point below the spring and upon a natural stream flowing therefrom, then the principle of law involved would have been entirely different from that now presented. The land where respondent made his excavation was his own land, and the spring was situated thereon, although that fact is immaterial; for, as Justice Crockett said in *Hanson v. McCue*, 42 Cal. 305, 10 Am. Rep. 292, "if the plaintiff was the owner of the Dixon spring, with a consequent right to the use of all of its waters, the defendant would have the clear right to dig upon his adjoining land for any useful purpose, notwithstanding he might thereby divert the percolations, and thus destroy the spring." The digging of respondent was upon his own land; he interfered with no natural stream of water, either surface or subterranean; the waters were percolating waters, a part of the soil itself, and of which the owner had the free and absolute use. Under such circumstances, the owner of the land cannot be disturbed. This principle is settled law. (*Hanson v. McCue*, 42 Cal. 305; 10 Am. Rep. 292; *Mosier v. Caldwell*, 7 Nev. 102; *Dehli v. Youmans*, 50 Barb. 316; Angell on Watercourses, sec. 112) It follows that the findings are sufficient to support the judgment.

Let the judgment and order be affirmed.

HARRISON, J., DE HAVEN, J., and BEATTY, C. J., concurred.

PATERSON, J., concurring.—I concur. No order was made striking out the cross-complaint; but the court finds it was withdrawn. Assuming, however, that it is still a part of the record, and that the court erred in admitting evidence to contradict the defendant's allegation that the water flowing from the spring formed a natural watercourse, there are no specifications of error.

The appellant's contention, therefore, cannot be considered.

The findings support the judgment, and there is no specification as to the insufficiency of the evidence to support any of the findings. The failure of the court to find on all the issues is not assigned as ground for a new trial,—it is not alleged that the decision is against law. As the facts found support the judgment, the failure of the court to find on any issue not necessary to support the judgment cannot be considered on the appeal from the judgment. (*Winslow v. Gohrensen*, 88 Cal. 450.)

McFARLAND, J., dissenting.—I am not able to concur in the judgment of affirmance. It is true that the pleadings, the objections and exceptions (and the want of them), the findings, and certain occurrences at the trial, present such an uncertain, disjointed, and unsatisfactory record, that it was difficult to see what was or was not decided in the court below. But I think there should be a new trial, so that, under amended pleadings and proper findings, it may be discovered what the real facts of the case are, and what principle of law is applicable to the rights asserted by the parties. And I think that the deficiencies of the findings are ground for reversal.

In the complaint it is averred, in substance, that "on the seventh day of October, A. D. 1886, the plaintiff appropriated the waters flowing into and from a certain spring [describing its location] to the extent of five (5) inches measured under a four-inch pressure; that it conveyed the said water to Cameron Station on its railroad, and used it for supplying its locomotives and employees with water; and that it continued to so use it until the—day of February, 1889, when defendant wrongfully diverted it from the pipes and tanks of plaintiff. The answer denies that plaintiff ever appropriated any of said waters at any time, or that defendant wrongfully diverted the same; and avers that since July 31, 1888, defendant has been the owner in fee of certain described land; that the spring is on said land; that

"the water flowing from said spring forms a natural watercourse flowing through defendant's said land," and that defendant, as a riparian owner, uses, and has the right to use, "said spring and watercourse" for domestic purposes, watering stock, etc., and that plaintiff, since said July 31, 1888, has, by means of a pipe, tapped "said spring, and the waters flowing therefrom," and diverted them away from defendant's land.

It is clear, therefore, from the pleadings, that there is a "watercourse" having its source at the spring. It is said that defendant "withdrew" that part of his answer which admitted and averred this watercourse. In my judgment it certainly was not withdrawn. The part of the answer which contains this averment is called by the parties a cross-complaint. What happened was simply this: After defendant had rested, plaintiff's counsel—for some reason—chose to say that he desired to introduce the so-called cross-complaint in evidence; whereupon defendant's counsel made the remark, "I desire to say we dismiss the cross-complaint." This remark amounted to nothing more than any other expressed desire for something never obtained,—even if any meaning could be attached to the word "dismiss" as therein used. The status of the answer was not changed in the least by the remark; and it would not have been changed if counsel had used the word "withdraw." He could not have withdrawn the answer by taking physical possession of the paper on which it was written and putting it in his pocket,—which would have been a much more palpable thing than the mere expression of a desire to withdraw it. The record could not have been changed to suit counsel's desire without an order of court.

The main issue in the case, therefore, was, whether plaintiff had appropriated any part of this watercourse; and the only findings on this issue were, that "the plaintiff did not, *on the seventh day of October, 1886*, appropriate the waters flowing into and from a certain spring, . . . to the extent of five inches measured under a four-

inch pressure," and "that plaintiff did, from the seventh day of April, 1866, up to the——day of February, 1889, enjoy the uninterrupted use of some water taken by it from said spring," but that the amount was less than five inches. Of course these findings are utterly irresponsible to the said issue. And there were other findings fully as defective as these.

It is said, however, that defective findings on all other issues are immaterial, because the court found (in findings 5 and 7) that the spring was "fed solely by percolating waters," and not by "any running stream of water," and that the water was taken away from the spring and watercourse by a trench which defendant dug on his own land near the spring, "with a view of securing water for his sheep and stock." I think that finding 7 is entirely too vague and uncertain to form a basis for the application of certain alleged doctrines about precolating waters. I have not been able to find any case in which it has been held that a spring and watercourse originating in it can be lawfully undermined and destroyed by a trench or tunnel run for that express purpose, to the injury of a vested right in the watercourse. And the evidence in the case at bar tends strongly to show that defendant's tunnel and trench were run for the express purpose of destroying the spring and watercourse; and that the main effect was, not to prevent percolating waters from flowing into the spring, but to compel the waters of the spring and watercourse to flow *out*, and down into the trench. I think, therefore, that the findings should have been more specific on this point, and should have stated the facts clearly and fully. It may be remarked that a watercourse is none the less a watercourse because it has its source in a spring fed by "percolating" waters.

The case relied on by respondent is *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 292. There were two opinions delivered in that case, one of which was based mainly on *Wheatley v. Baugh*, 20 Pa. St. 528, 64 Am. Dec. 721 (the citation in the opinion being incorrectly given as

23 Pa. St.), and the other upon the trustees of *Delhi v. Youmans*, 50 Barb. 316. In the Pennsylvania case the facts were that "a mining corporation, in the course of necessary operations in mining minerals from their own land, interrupted the percolations which supplied a spring on an adjoining tract;" and of course the court held that where a miner working his mine in the usual way, interrupts percolating underground water the result is incidental to the lawful use of his land, and if it causes loss to an adjoining proprietor, such loss is *damnum absque injuria*. In the case from 50 Barbour, the facts do not so clearly appear; but the court says that "if the defendant's excavation or ditch drew the water from the plaintiff's spring instead of stopping the flow of water from defendant's land to such spring, then the defendant would be liable in this action." In *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 292, itself, the facts were materially different from those in the case at bar. In that case, if there had been a natural watercourse running from the spring, which Hanson had appropriated years before McCue or his grantors had acquired any estate in the land, and McCue had afterwards diverted any of the water to the injury of Hanson's prior right, then the facts would have been similar to those claimed by plaintiff in the present case. But the facts in that case were, that McCue's grantor owned the land on which the spring was as early as 1844, in which year he constructed an artificial ditch, by which he carried the water several hundred yards to a vineyard. This ditch crossed a piece of "unoccupied and unclaimed" land, which Hanson did not acquire until a dozen years afterwards. When McCue undertook to change the course of the water, thus leaving the old ditch dry, Hanson claimed that he had acquired a right by prescription to have the water continue to flow in the old ditch; but the court held that there was no such prescriptive right, because McCue would have no right to complain that the water in the artificial channel, after leaving the spring, was used below by Hanson, and therefore there was no "pre-

sumption of the grant of an easement." Therefore, as Hanson had no right to the flow of the water through the artificial ditch, it made no difference what McCue did with it,— and that consideration was determinative of the case. But in the case at bar plaintiff claims that it appropriated the waters of the spring and watercourse to a useful and most necessary purpose, while the land on which they were situated was public land, and years before the defendant had any interest therein.

Nearly all the cases in which the disturbance of percolating water has been held harmless have been cases where the party charged has dug a well, or worked a mine, or made some other excavation in the lawful enjoyment of the ordinary use of his land, and where the loss to the complaining party was merely incidental to such use, and not the result of a direct intent to cause such loss. (Two very instructive and exhaustive opinions upon the subject are to be found in *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72, and *Dickinson v. Canal Co.*, 7 Exch. 282.) I fear that the affirmance of the judgment of the case at bar, as it now stands, will make a precedent that will be misleading as to some interesting and important phases of the law of water rights. I think that the case should be retried under proper pleadings; and that there should be findings upon all the material issues, setting forth clearly and fully the pivotal facts of the case.

Rehearing denied.

XCV. CAL.—49

[No. 14712. Department One. — August 15, 1892.]

**M. J. CHURCH, RESPONDENT, v. J. W. SHANKLIN
ET AL., APPELLANTS.**

MORTGAGE — CONDITION AS TO APPROVAL OF TITLE BY ATTORNEYS — VALIDITY OF TITLE IMMATERIAL IN ABSENCE OF FRAUD. — In an action to foreclose a mortgage given to secure the payment of promissory notes, payable to the mortgagee when he should perfect the title to certain land to the satisfaction of certain attorneys named, where it appears that the attorneys named rejected the title, and there is no allegation that their action was controlled by fraud, collusion, or undue influence, the mortgagee cannot recover, although the court may find the title to be in fact good.

ED. — ARBITRATION — PERFORMANCE OF CONTRACT — DECISION OF UMPIRE — JURISDICTION OF COURT. — When parties to a contract fix upon an umpire and agree to abide by his decision, neither of them, without the consent of the other, can, in the absence of fraud, withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a court or jury.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Church & Cory, for Appellants.

The plaintiff was not entitled to recover, as it was not shown that the title was satisfactory to the attorneys chosen, in accordance with the condition of the notes. (*Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 465; *Aiken v. Hyde*, 99 Mass. 183; *Gibson v. Cranage*, 39 Mich. 49; 33 Am. Rep. 351; *Wood Reaping etc. Co. v. Smith*, 50 Mich. 565; 45 Am. Rep. 57; *Silszy Mfg. Co. v. Chico*, 11 Saw. 183; *McCarren v. McNulty*, 7 Gray, 139; *Gray v. Central R. Co.*, 11 Hun, 70; *Hallidie v. Sutter St. R. Co.*, 63 Cal. 575; *Heron v. Davis*, 3 Bosw. 336; Benjamin on Sales, Bennett's notes, sec. 560, note 12; Wharton on Contracts, sec. 594, note 2; *Mfg. Co. v. Brush*, 43 Vt. 528; *Hoffman v. Gallagher*, 6 Daly, 42; *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446; *Tyler v. Ames*, 6 Lans. 280; *Butler v. Tucker*, 24 Wend. 447; *Barton v. Hermann*, 11 Abb. Pr., N. S., 387; *Ehaust Elevator Co. v. R. R. Co.*, 66 Wis. 218; *Packard v. Van Shoick*, 58 Ill. 79.) In order to en-

title the plaintiff to recover, it must be shown that the attorneys fraudulently and capriciously refused to be satisfied with the title. (*Adams v. New York*, 4 Duer, 295; *Wyckoff v. Winham*, 44 N. Y. 143; *Miller v. White*, 50 N. Y. 144; *Lloyd on Buildings*, 26, 27.)

B. P. Davidson, and *Firman Church*, for Respondent.

In this case the gist of the condition was, that the title should be perfected, and whenever that was done the plaintiff had done all he could do, and it was the duty of the parties to be satisfied. (*Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; 54 Am. Rep. 709; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 479; 7 Am. Rep. 469; *Miesell v. Globe Mut. L. Ins. Co.*, 76 N. Y. 119; *Wetterwulgh v. Knickerbocker Building Ass'n*, 2 Bosw. 381; *Folliard v. Wallace*, 2 Johns. 395; *People v. Alameda Co.*, 45 Cal. 396; *Stockton & V. R. R. Co. v. Stockton*, 51 Cal. 338, cited with approval in *Wood v. Strother*, 76 Cal. 550.)

PATERSON, J. — This is an action to foreclose a mortgage given to secure the payment of two promissory notes, for the sum of five thousand dollars each, payable by defendants to plaintiff "whenever he perfects the title to lots 14, 15, and 16, in block 85, of Fresno, to the satisfaction of Church & Cory, attorneys. . . . Neither principal nor interest to be due and payable until said title is perfected as aforesaid, nor until one year."

The record fails to show that Church & Cory refused to express satisfaction with the plaintiff's title through any fraudulent or improper motive. The learned judge of the court below, in determining the issues between the parties, stated he would assume that the attorneys acted in the best of faith, but held that if the title was in fact good, the defendants could not refuse to pay the note because their attorneys were not satisfied with the title. In this we think the court erred. The case at bar differs in two very material respects from the cases cited by respondent, namely, there was conceded to be a

defect in the title at the time the notes were executed and delivered, requiring action on the part of the plaintiff to cure, and the arbitrators selected were not parties to the contract, but were disinterested persons chosen for the express purpose of passing upon the title. It was doubtless the object of the parties to avoid disputes and expensive litigation, — certainly some effect must be given to the stipulation contained in the agreement. To hold that the opinion of the court as to the validity of the title can be substituted for that of the arbitrators would defeat the intention of the parties, and in effect make a new contract for them. This the court has no right to do. The parties saw fit to make Church & Cory the umpires between them, and if the latter exercised their best judgment in good faith, and with an honest intention of determining the question as to the validity of the title, their conclusion is final and binding; it cannot be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Suppose that Church & Cory had certified that the title was perfect, could it be maintained that the defendants could defeat a recovery on their notes by showing that in fact the title was no better than when the contract was made? We think not. In *Butler v. Tucker*, 24 Wend. 449, the court said: "The defendant does not set up that part of the covenant which requires the work to be done to *his* satisfaction; and in omitting to do so he has acted very properly. As to that, it would probably be enough for the plaintiff to aver that the work was in all other respects completed in pursuance of the contract; for if the defendant was not satisfied with such a performance, it would be his own fault, and as a general rule, a party cannot insist on a condition precedent when he has himself defeated a strict performance. But when parties fix on an umpire, and agree to abide by his decision, neither of them, without the consent of the other, can withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a jury." In *Wallace v. Curtiss*, 36 Ill. 158,

the court said: "No fraud of the inspector is suggested, and if he was deficient in judgment, not being able properly to discriminate between the different classes of lumber, it is the misfortune of the defendants in choosing him. By choosing him they relied on his judgment, and must be concluded by it, in the absence of all frauds." (See also *Kihlberg v. United States*, 97 U. S. 401; *Doll v. Noble*, 116 N. Y. 232; *Whiteman v. Mayor*, 21 Hun, 120; *Baasen v. Baehr*, 7 Wis. 520; *McCarren v. McNulty*, 73 Mass. 141; *Duplex Safety Boiler Co. v. Garden*, 54 Am. Rep. 711, note; *Worsley v. Wood*, 6 Term Rep. 722.)

The appellant offered to show at the trial that other reputable attorneys did not consider the title perfect, or what is known as a "merchantable title," but on objection of the plaintiff the offer was excluded. It cannot be claimed, therefore, that in rejecting the title, Church & Cory acted capriciously, which, if alleged and proved, might be taken as a badge of bad faith.

As there was no allegation in the complaint that the action of the arbitrators chosen by the parties was controlled by fraud or collusion between them and the defendants, or by undue influence of any kind, we think the demurrer ought to have been sustained. The notes, according to their terms, cannot mature, and no action therein can be maintained, until Church & Cory, acting in good faith, state that in their opinion the title has been perfected, or some sufficient reason is shown why they have not done so.

The judgment and order are reversed, and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint.

HARRISON, J., and DE HAVEN, J., concurred.

[No. 14474. Department One. — August 15, 1892.]

**JOHN GUIDERY, ADMINISTRATOR, ETC., RESPONDENT,
v. R. M. GREEN, APPELLANT.**

ACTION TO DISSOLVE PARTNERSHIP — AGREEMENT SUPERSEDING PARTNERSHIP CONTRACT — AMENDMENT OF ANSWER UPON TRIAL. — In an action for a dissolution and accounting of an alleged partnership, based upon the violation of a written agreement entered into by the defendant with the plaintiff's intestate, where the defendant denied the partnership, and set up as one of his defenses that the alleged agreement had been superseded and annulled by a subsequent written agreement between plaintiff, defendant, and a third party, and upon the trial, after having proved the execution of the subsequent agreement, sought to show by oral testimony that it had been executed upon the consideration and agreement that the first agreement should be canceled, and all claims of plaintiff's intestate against the defendant waived thereunder, but an objection was made to the testimony, upon the ground that it was incompetent, and not responsive to any of the issues raised by the pleadings, which objection was sustained, it is error for the court to refuse to allow the defendant to amend his answer so as to obviate the objection that the evidence was not within the issues.

ID. — AMENDMENT TO ALLOW PROOF OF DEFENSE — SURPRISE — CONDITION OF AMENDMENT. — The court should allow the defendant to make amendments to his answer, to enable him to prove facts which will constitute a defense to plaintiff's demand; and if by reason of such amendments the court is satisfied that the plaintiff is taken by surprise, and requires further time to prepare to meet the defense, it can continue the case, and impose such terms as will compensate plaintiff for the expense and delay caused thereby.

ID. — DUTY OF COURT — CORRECTION OF DEFECTIVE LANGUAGE — DEFENSE KNOWN TO ADVERSARY. — It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate an objection that the facts which constitute his cause of action or his defense are not embraced within the issue, or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not that it is then for the first time brought to the notice of the adversary, but that by reason of the language of the pleading it is not within the terms of the issue.

ID. — PAROL EVIDENCE — NEW WRITTEN CONTRACT — SUPERSEDING FORMER BY ORAL AGREEMENT. — Parol evidence offered for the purpose of showing that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the action is based, had been executed upon the consideration and agreement that the prior contract should be canceled, and all claims of the plaintiff against the defendant thereunder waived, is not incompetent as having the effect to vary or contradict the terms of either of the written instruments, or to add any terms thereto.

ID. — EXECUTED PAROL AGREEMENT — CANCELLATION OF WRITTEN CONTRACT — SUBSTITUTION OF NEW CONTRACT — NOVATION. — It is competent to show by parol evidence that the former written contract was

canceled as between the parties, and has no longer any existence, and to show an oral agreement for the substitution of a new written contract that was fully executed by the substitution, which is, in effect, to prove a novation.

ID. — CONSIDERATION OF WRITTEN CONTRACT — PAROL EVIDENCE. — It is competent to show that the oral agreement was the consideration upon which the new written contract was executed, the instrument being itself silent upon the subject of its consideration.

ID. — COLLATERAL PAROL AGREEMENT. — Proof of a collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of the terms of a written contract, is always admissible, even though it may relate to the same subject-matter.

APPEAL from an order of the superior court of Butte County denying a motion for a new trial.

The action was brought for a dissolution of a partnership and an accounting, under an agreement in writing set out at length in the complaint, and from which it appears that on the twelfth day of January, 1885, the defendant, R. M. Green, was the discoverer and owner of certain formulæ for the manufacture of medicines composed in part of the gum of the abietine tree; that at the same time the defendant and the plaintiff, J. M. Frost, now deceased, and in whose stead his administrator, John Guidery, has been substituted, owned and jointly held a contract with one Williams, for the purchase from said Williams of a grove of abietine trees; and that it was the desire of the said Green and Frost to form a company for the manufacture and sale of said medicines; that said Frost should negotiate a sale of interest in said properties, for a sum of money satisfactory to said Green, and in case of such sale Green was to be paid five thousand dollars for his property rights. Williams was to be paid his price for the property rights. Williams was to be paid his price for the grove of trees, and the balance of the purchase price was to be equally divided between Green and Frost. Frost was likewise, in the event of a sale by him, to have an undivided half-interest in the unsold portion of the property. In addition to this, Frost was to have the exclusive right to sell the remedies in the state of Ohio for one year, Green agreeing to deliver such medicine at stated prices. It was further agreed that in the event Frost should be unable to make a sale,

after the use of due diligence to that end, then, in consideration of such services, he was to be the owner of an undivided one fourth of said property rights. The answer denies the existence of a partnership; denies that Frost performed the conditions of the contract, on his part to be performed; and alleges, as a separate defense, that subsequent to the execution of the contract of January 12, 1885, and in or about the month of March, 1885, Frost associated with him one Threlfall, and jointly with said Threlfall obtained from said Green an agreement in writing wherein and whereby the agreement of January 12, 1885, was superseded, vacated, and annulled. On the trial the defendant proposed an amendment to the answer, under the circumstances detailed in the opinion, and to the effect therein stated, which amendment was disallowed by the trial court. The evidence was confined exclusively to the question of the existence of a partnership, and the subsequently executed agreement, and the court, without directing an accounting, ordered the defendant to deliver to said plaintiff Frost a certain number of the shares of the Abietine Medical Company's stock, which had been received by Green as the purchase price of his proprietary rights. The defendant moved for a new trial, and the appeal is from an order refusing the new trial.

Further facts are stated in the opinion of the court.

H. V. Reardan, for the Appellant.

John Gale, for the Respondent.

HARRISON, J.—The plaintiff's intestate, one Frost, brought this action to obtain certain specific relief for an alleged violation of a written agreement entered into between him and the defendant, January 12, 1885. The defendant set up as one of his defenses to the action that the agreement set out in the complaint had been superseded and annulled by a subsequent written agreement, executed in March, 1885, by the plaintiff and one Threlfall on the one part, and the defendant on the other.

Upon the trial of the cause, the defendant, after having proved the execution of the subsequent written agreement, sought to show that it had been executed upon the consideration and agreement between the parties thereto that the agreement of January 12, 1885, should be canceled, and all claims of the plaintiff against the defendant thereunder waived. The plaintiff objected to this testimony, on the grounds that it was an attempt by parol evidence to vary and contradict the terms of a written instrument, and also that it was not responsive to any issues made by the pleading. The court having sustained this objection, the defendant then presented certain amendments to his answer, in order to obviate the objection that the evidence was not within the issues, which he asked leave to file. To this the plaintiff objected, upon the ground "that it is too late, that it is unconscionable, that it is taking us by surprise, and that it shows gross negligence on their part in not asking to amend before," which objections were sustained by the court.

If the defendant could establish the facts presented by these amendments to his answer, they would constitute a defense to the plaintiff's demand (*Farmers' N. G. Bank v. Stover*, 60 Cal. 387); and for that reason, if for no other, the court should have allowed the amendments. (*Stringer v. Davis*, 30 Cal. 321.) If, by reason of such amendments, the court was satisfied that the plaintiff was taken by surprise, and required further time in which to make suitable preparations for meeting such defense, it could have continued the case or postponed the further hearing until the plaintiff should have reasonable time to make such preparation, and at the same time would impose upon the defendant such terms as would compensate the plaintiff for the expense and delay caused thereby. It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within

the issues, or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not that it is then for the first time brought to the notice of the adversary, but that by reason of the language of the pleading it is not within the terms of the issue. The fact sought to be shown by the testimony offered on the part of the defendant was not a defense then for the first time presented in the case. The defendant had attempted to set it up as a defense in his original answer, but by reason of certain phraseology used therein, the court held, upon the objection of the plaintiff, that it did not present an issue that would render the testimony admissible; and when the defendant asked leave to amend his answer so as to obviate this ruling, the court should have granted his motion.

The evidence offered did not purport to vary or contradict the terms of the written instrument set forth in the complaint, nor did it have the effect to add any new term to that agreement. Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action. The objection that the written agreement could be altered only by an agreement in writing, or by an executed oral agreement (Civ. Code, sec. 1698), has no application to the facts offered to be shown. The offer was to show that the subsequent written agreement had been substituted for the original agreement, and the oral agreement of which proof was offered was the agreement to make this substitution. It was not an offer to prove an executory oral agreement, but an oral agreement that had been

fully executed by the substitution. This in effect was an offer to prove a novation. (*Farmers' N. G. Bank v. Stover*, 60 Cal. 387.) Neither did this testimony tend to vary or contradict the terms of the subsequent written agreement, but was merely for the purpose of showing the consideration upon which it was executed. The instrument itself was silent upon the subject of its consideration, and any evidence in reference thereto would not affect its terms or impair their validity.

After the defendant had proved the execution of the second written agreement, the witness Threlfall was asked concerning the compensation he and Frost were to receive from the defendant in case they should make the sale therein provided for; and upon the objection that this testimony would vary or contradict the terms of the written instrument, the court excluded it. The written agreement, however, made no reference to the compensation they were to receive, and the evidence sought was concerning a separate collateral agreement entered into between the parties, and was entirely independent of any of the terms of the written agreement, and the court should have allowed the question to be answered. Proof is always admissible of any collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of the terms of the written contract, even though it may relate to the same subject-matter.

The order is reversed.

PATERSON, J., and GABOUTTE, J., concurred.

[No. 14831. Department Two. — August 15, 1892.]

**NELLIE BURTON DE PEDRORENA, RESPONDENT,
v. A. B. HOTCHKISS ET AL., APPELLANTS.**

APPEAL — SERVICE OF NOTICE — OBJECTION TO JURISDICTION — WAIVER UNDER RULES. — An objection by a respondent to the jurisdiction of the supreme court to entertain the appeal, on the ground that it does not appear that the notice of appeal was served, will not be considered by the court, where the objection was not taken and notified to the appellant in writing ten days before the hearing, as provided for by the rules of the supreme court.

ID. — AFFIDAVIT OF INCURABLE DEFECT IN TRANSCRIPT. — The consequence of failing to give such notice as provided by the rules cannot be avoided by the making of an affidavit by the respondent to the effect that the defect cannot be cured by a suggestion of diminution of the record, under the rules.

ID. — JUDGMENT ROLL — ORDERS NOT INCORPORATED IN BILL OF EXCEPTIONS — SETTING ASIDE DEFAULT — STRIKING OUT ANSWER. — An order setting aside a default upon conditions, and an order striking out an answer for failure to comply with the conditions, do not constitute part of the judgment roll, and cannot be considered as part of the record upon appeal from the judgment, though printed in the transcript, if not incorporated in a bill of exceptions, and no points attempted to be made in regard to them can be noticed upon such appeal.

DEED IN CONSIDERATION OF LEGAL SERVICES — TRUST — REPUDIATION OF CONTRACT — FAILURE OF CONSIDERATION — UNDUE INFLUENCE — RESCISSION — PLEADING — SUFFICIENCY OF CAUSE OF ACTION — SPECIAL DEMURRER. — A complaint which alleges that the plaintiff's ancestor conveyed to the defendant's wife certain real estate for the expressed consideration of legal service to be rendered by the defendant, and that the defendant agreed to examine and quiet the title to the property at his own cost and expense, and then to reconvey one half thereof to the grantor; but that although eight years had elapsed since the conveyance of the property to the defendant's wife, the appellant had not performed or attempted to perform his agreement; that the title to the property is still clouded, and that the conveyance and agreement were without consideration, and were procured solely by the undue influence of the defendant; that the defendant not only made no attempt to perform the agreement which constituted the whole consideration for the conveyance, but in violation of the trust so created, had sold a portion of the property, appropriating the proceeds to himself, and repudiating the obligations of the agreement and trust, and claiming to be the absolute owner of the property, — although inconsistent, illogical, and insufficient as against a special demurrer, is sufficient, in the absence thereof, to support a decree that the deed to the defendant's wife was void against the plaintiff, except as to the portion conveyed to a *bona fide* purchaser without notice.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

A. B. Hotchkiss, for Appellants.

J. E. Deakin, for Respondent.

TEMPLE, C.—This appeal is from the judgment, without a bill of exceptions, and practically by defendant Hotchkiss alone; for although the notice of appeal is signed by Hotchkiss as attorney for the defendants, the other defendant filed a disclaimer in the lower court, and no point is made here in his behalf.

Objection is made by respondent to the jurisdiction of the court to entertain the appeal, on the ground that it does not appear that the notice of appeal was served. The rules of this court provide that "exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical objection or exception to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which can be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing, at least ten days before the hearing, or they will not be regarded."

This was not done in this case, and it is quite evident that the objection is one which may be avoided in the mode pointed out. Respondent's attorney states in his brief that he has filed an affidavit in this court, which shows that the defect cannot be cured by a suggestion of diminution of the record. No such affidavit is found here in the record, and I know of no warrant for such practice, nor can I see how any such affidavit could be made which might not be controverted. The consequence of failing to give the notice required by the rule cannot be avoided by making the affidavit.

The judgment is by default entered upon defendant's failure to appear and answer. He therefore had no attorney of record, or if he had, perhaps the proof of service of the notice of appeal might show due substitution

of attorneys, if we concede that such substitution was necessary to sustain the notice of appeal.

Notwithstanding the default, an answer on the part of defendant Hotchkiss is found in the judgment roll; yet it is recited in the decree that judgment was taken against the defendant Hotchkiss upon his default, which had been duly entered.

There are two minute orders printed in the transcript, from one of which it appears that the default was set aside and defendant allowed to answer upon certain stated conditions, and from the other, that the answer filed was stricken out, because defendant had failed to comply with the conditions upon which the default was set aside, and he was permitted to answer. The statute does not make these minute orders part of the judgment roll. (Code Civ. Proc. sec. 670.) They are, therefore, improperly in the record,—there being no bill of exceptions,—and we cannot notice the points attempted to be made in regard to them. Orders striking out pleadings do not constitute part of the judgment roll. (*Douglass v. Dakin*, 46 Cal. 49.) We must presume, therefore, in favor of the regularity of the judgment. In this case, however, although there is an answer on file, it appears to have been filed after Hotchkiss had made default, and his default had been duly entered.

It only remains to inquire, therefore, whether the complaint is sufficient to support the decree.

The complaint shows that plaintiff's ancestor conveyed to appellant's wife certain real estate for the expressed consideration of legal services to be rendered by appellant; that contemporaneously with the grant, appellant and wife executed an agreement in writing in which it was recited that the grantor owned certain lots of land (the same conveyed), the title to which was clouded. Appellant agreed to examine the title to all the properties conveyed, to clear the title to such as the grantor owned at his own cost and expense, and then to reconvey one half thereof to the grantor.

The grant and agreement were made in 1880; the suit was brought in 1888; it is averred that appellant has not performed or attempted to perform his agreement, that the title to the property is still clouded, and that the conveyance and agreement were without sufficient consideration, and were procured solely by the undue influence of appellant. It is further alleged in the complaint that the appellant has not only made no attempt to perform the agreement which constituted the sole consideration for the conveyance, but, in violation of the trust created by the transaction, has sold a portion of the property, appropriating the proceeds to himself, and repudiating the obligations of the agreement and the trust, and claims to be the absolute owner of the property.

The complaint could not be sustained as against a special demurrer. It is inconsistent, illogical, and insufficiently states the facts. It avers that the conveyance was made without consideration, but shows that there was sufficient consideration for the conveyance, which, however, has wholly failed. It avers that the conveyance was procured by the undue influence of appellant, but states no facts or circumstances in regard to the exercise of such influence. If it be conceded that the facts and circumstances ought to have been specifically detailed, yet it is but the case of an insufficient statement, and not the lack of an essential fact.

Counsel quotes section 1566 of the Civil Code, and claims that the conveyance was not wholly void, and that plaintiff ought to have proceeded to rescind, as prescribed in the code. This suit is practically for that purpose.

As appellant, according to the allegations of the complaint, had done nothing in the way of performance, and had parted with nothing, but wholly repudiated the contract and the trust relation, nothing was required of plaintiff in the way of placing him *in statu quo ante*.

I therefore advise an affirmance of the judgment.

VANCLIEF, C., and FOOTE, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

McFARLAND, J., DE HAVEN, J., SHARPSTEIN, J.

[No. 20756. Department One. — August 17, 1892.]

THE PEOPLE, RESPONDENT, v. I. N. CHOYNSKI,
APPELLANT.

CRIMINAL LAW — THREATENING LETTER — INTENT TO EXTORT MONEY —
INFORMATION — CONTENTS OF LETTER — ADAPTATION TO IMPLY THREAT.

—An information charging the defendant with sending a threatening letter with intent to extort money, which sets forth the letter, wherein defendant asked the person addressed to take some matter off from his hands which he had written for and in his behalf as the editor of a newspaper, and relieve him from further responsibility, and stating that he would go to press the next day, and which charges that the writing was adapted to imply threats, is sufficient to charge the offense. It is not necessary that a threat should be apparent from the face of the letter, nor that it should be implied therefrom; but it is sufficient that the language used is adapted to imply a threat.

1D. — INSTRUCTION — WHAT THREAT LETTER MUST BE ADAPTED TO IMPLY.

—An instruction to the jury, to the effect that it is not necessary to specify the offense imputed to the person to whom the letter is sent, but that if it does express or imply, or is adapted to imply, "any threat," the offense is committed, is too broad. The letter must be adapted to imply one or more of the threats mentioned in section 519 of the Penal Code, or the offense is not committed.

1D. — TRUTH OR FALSITY OF CHARGE IMMATERIAL. — In a criminal prosecution for the sending of a threatening letter with intent to extort money, the truth or falsity of the charge is immaterial, and it is not necessary to instruct the jury upon such matters.

1D. — ELEMENTS OF OFFENSE. — An instruction to the jury, to the effect that if the defendant is shown to be guilty of sending the letter, "with the motive imputed, he is guilty of this offense, and should be found guilty, no matter as to the consequences, whatever they may be," is erroneous. The court should have added, that it was not only necessary for the accused to have sent the letter, and have had the intent to extort, but that the letter must have been such a writing as was adapted to imply a threat, in order to justify a conviction.

1D. — ARGUMENTATIVE CHARGE — RESUME OF EVIDENCE — MATTERS OF FACT. — A charge to the jury should not be argumentative, or give a resume of the evidence, or encroach upon the right of the jury by nar-

ing upon matters of fact. The judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Robert Ferral, and Joseph Rothschild, for Appellant.

Attorney-General W. H. H. Hart, and John L. Love, for Respondent.

GAROUTTE, J. — The appellant was convicted of a felony, to wit, sending a threatening letter with intent to extort money, and now prosecutes an appeal to this court from the judgment and order denying his motion for a new trial. The prosecution is based upon section 523 of the Penal Code, which reads as follows: "Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section 519, is punishable," etc. The letter sent by appellant, and upon which this prosecution was founded, reads:—

"OFFICE 'PUBLIC OPINION,' I. N. CHOYNSKI, EDITOR,
137 TAYLOR STREET.

"SAN FRANCISCO, 20, 2, 1890.

"O. LIVERMORE, Esq..

"*Dear Sir,* — You will please take the matter I have written for and in your behalf, and relieve me of any further responsibility. Respectfully, etc.,

"I. N. CHOYNSKI."

"Will go to press to-morrow, Friday."

The demurrer to the information was properly overruled. It is not necessary that a threat should be apparent from the face of the letter, nor even necessary that it should be implied therefrom. The statute says

if the language used is adapted to imply a threat, then the writing is sufficient. Parties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysterious and ambiguous phrases, — mysterious and ambiguous to the world at large, but read in the light of surrounding circumstances by the party for whom intended, they have no uncertain meaning. In addition to matters of innuendo stated in the information, it is charged in the language of the statute that the writing was “adapted to imply threats,” and circumstances showing its adaptation to such purpose were entirely matters of evidence. We pass to a consideration of the instructions of the court.

After reading the section of the code to the jury, heretofore quoted, the court said: “You will see, gentlemen, that the intent of the statute is to cover every supposable case. It does not require the character of the charge of threatening to be made against the person to be set out. It is not necessary to specify the offense imputed to the person to whom the letter is sent; but if it does express or imply, or is adapted to imply, any threat, the offense is committed.” The instruction is too broad, as it tells the jury that if the letter “is adapted to imply *any threat*, the offense is committed.” The letter must be adapted to imply one or more of those threats specially mentioned in section 519, or the offense is not committed.

There was evidence introduced by the prosecution as to the falsity of the charge which was threatened to be made against the prosecuting witness, and the court instructed the jury upon such matters. As the cause must be returned to the lower court for a new trial, we would suggest that in the character of action here pending, the truth or falsity of the charge is immaterial. It was said in *Morrill v. Nightingale*, 93 Cal. 456: “Under that kind of menace which consists in a threat of injury to the character of a person, it is entirely immaterial whether such person is guilty or innocent of the crime to be charged. It certainly would be no defense to the accusa-

tion of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or falsity of those matters forms no element in establishing the guilt or innocence of a defendant charged with such extortion."

The court gave the jury the following instruction: "But if this man is shown guilty of sending this letter with the motive imputed, he is guilty of this offense, and should be found guilty, no matter as to the consequences, whatever they may be." This instruction is clearly erroneous, for, as we have seen, the letter which forms the foundation of the prosecution does not upon its face either convey a threat or imply a threat; and in addition to the elements of the offense included in this charge to the jury, as sufficient to justify a conviction, the court should have added, that it was not only necessary for the accused to have sent the letter, and have had the intent to extort, but the letter must have been such a writing as was adapted to imply a threat. That was a question of fact to be found in the affirmative by the jury before a verdict of guilty could be rendered under the law.

The charge, taken as a whole, is objectionable; it is argumentative, — consisting to a great extent of a *résumé* of the evidence, and in many respects encroaching upon the rights of the jury by passing upon matters of fact. We had occasion to refer to this subject in *People v. Gordon*, 88 Cal. 422, and there quoted with approval, as we again do, the following language from *People v. Williams*, 17 Cal. 147: "The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court; a word, a look, or a tone may sometimes in such cases be of great or even of controlling influence. A judge cannot be too cautious in a criminal

trial in avoiding all interference with the conclusions of the jury upon the facts."

Let the judgment and order be reversed, and the cause remanded for a new trial.

PATERSON, J., and HARRISON, J., concurred.

[No. 14702. Department Two. — August 17, 1892.]

JAMES SELICK, RESPONDENT, v. C. W. DE CARLOW ET AL., APPELLANTS.

COST BILL — PREMATURE FILING — MOTION TO STRIKE OUT. — A cost bill filed before the filing of the findings and entry of judgment is filed before the time authorized by law, and should be stricken out upon motion.

APPELLATE JURISDICTION OF SUPREME COURT — ORDER AFTER JUDGMENT INVOLVING LESS THAN THREE HUNDRED DOLLARS. — The question whether or not the supreme court has jurisdiction of an appeal from a separate, independent order, made after final judgment, involving money only, and in an amount less than three hundred dollars, considered, but not decided.

APPEAL from an order of the Superior Court of Lassen County denying a motion to strike out a cost bill.

The facts are stated in the opinion of the court.

Spencer & Raker, for Appellants.

Goodwin & Goodwin, for Respondent.

McFARLAND, J.—This is an appeal from an order made after final judgment, denying defendants' motion to strike out plaintiff's cost bill and its amount from the judgment. The action was for an injunction restraining defendants from diverting certain water, and for damages. Judgment was rendered for plaintiff, restraining defendants as prayed for and for twenty dollars damages. The decision—that is, the findings—and the judgment were filed and entered March 20, 1891; and the cost bill in question was filed March 16th,—four days before the decision. Section 1033 of the Code of

Civil Procedure provides that a cost bill must be filed "within five days after the verdict or notice of the decision of the court or referee"; and it seems quite clear that the cost bill was filed in this case before the time authorized by law, and that the court erred in denying the motion to strike it out.

The cost bill involved here amounts to only \$113.85, but respondent does not make the point that this court has no jurisdiction of the appeal because the amount is less than \$300. Indeed, respondent has no points or brief on file; and as this court has two or three times entertained similar appeals where the point of jurisdiction was not raised, we do not feel disposed, in this case, to raise that point, and definitely determine it on our own motion.

We deem it proper to say, however, for future guidance, that the question whether or not this court has jurisdiction of an appeal from a separate, independent order made after final judgment, involving money only, and in an amount less than three hundred dollars, must be considered as at least an open question. It is settled, no doubt, that on an appeal from a judgment in an action to recover money alone, the jurisdiction is determined by the *ad damnum* clause in the complaint. (*Solomon v. Reese*, 34 Cal. 28; *Dashiell v. Slingerland*, 60 Cal. 653.) But we do not at present recollect any case in which it has been definitely held that this court has jurisdiction of an appeal from an order made after final judgment, where there was no appeal from the judgment, and where the amount of money which the order put "in controversy" was less than the sum mentioned in the constitution; although, as before stated, such appeals have been entertained in a few instances where the question of jurisdiction was not raised. On the other hand, it was held in Department, in *Langan v. Langan*, 83 Cal. 618, that an appeal from an order allowing \$150 to counsel, in a divorce suit, must be dismissed, because the amount involved was "too small to give the court jurisdiction"; and in *Oullahan v. Morrissey*, 73 Cal. 297,

the court in Bank held that where the plaintiff dismissed his action, he could not appeal, even from a *judgment* for costs, because the demand for costs, "being less than three hundred dollars, does not give this court jurisdiction." And we think that a thorough examination of all the decided cases would probably leave as *res integra* the question of the meaning of the constitutional words "demand . . . in controversy" when applied to appeals from motions involving less than three hundred dollars, made after final judgments. The question is an important one, because if this court has no jurisdiction of such appeals, its time should not be occupied with them, to the disadvantage of other litigants whose cases are legitimately before it.

The order appealed from is reversed, with directions to the superior court to grant the motion which it denied.

DE HAVEN, J., and SHARPSTEIN, J., concurred.

[No. 18024. Department One. — August 18, 1892.]

FRANK DUSY, RESPONDENT, v. FRANK J. PRUDOM
ET AL., APPELLANTS.

VACATING JUDGMENT — EXCUSABLE NEGLECT — ABSENCE FROM TRIAL —
NOTICE OF SETTING OF CAUSE — RELIANCE UPON OPPOSING ATTORNEYS.

— It is not an abuse of discretion for the trial court to deny a motion to vacate a judgment rendered in the absence of the parties against whom the judgment is given, on the ground of excusable neglect, where the application to set it aside simply shows that such parties had no notice of the setting of the case for trial; that they relied upon the belief that they were entitled to notice, as they were non-residents of the county; that the rules of court specified no time for the calling of the calendar and the setting of cases; and that the attorney for the applicant wrote to the attorneys for the adverse party, requesting them to inform him as soon as the cause was set; and that the parties and their attorney believed that the request would be complied with and no advantage taken of their absence.

1D. — DUTY OF PARTIES TO ACTION — NOTICE OF PROCEEDINGS. — Parties to an action and their attorneys, whether residents or non-residents of the county where the action is pending, must watch its progress, and

are charged with notice of the fact that it has been set for trial. The parties are bound to know the rules of the trial court, and if the rules fix a day for setting causes for trial, they are presumed to know the fact, and if the rules do not, they must govern themselves accordingly, and learn from the proceedings of the court when the case is to be heard.

2d. — REASONABLE OPPORTUNITY FOR TRIAL. — Parties will not be forced to trial without a reasonable opportunity to prepare therefor, and the court would abuse its discretion in refusing a continuance, or in refusing to set aside a judgment taken because of hasty action in setting a case for trial at an unreasonably early day, whereby a party has been unable to be present or to prepare for trial.

MECHANIC'S LIEN — JUDGMENT OF FORECLOSURE — NECESSITY OF LAND FOR USE OF BUILDING. — A judgment, in an action to foreclose a mechanic's lien, need not adjudge that the land directed to be sold is all necessary for the convenient use and occupation of the building, where the complaint alleges that all of the land is necessary for such purpose, and the court finds the allegation to be true.

3d. — ADJUDICATION OF OWNERSHIP OF LAND — NOTICE TO OWNER — SUBJECTION TO LIEN. — The failure of the judgment in such action to adjudge that at the commencement of the action the land belonged to the person who caused the building to be constructed, or that it was erected with his knowledge, does not render the judgment erroneous, where it is alleged and found that the defendant at whose instance the building was erected was at all times mentioned the owner and entitled to the possession of the property, and that the interests of the other defendants who claimed to have some interest therein were subsequent to the plaintiff's lien.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion of the court.

A. H. Carpenter, and S. J. Hinds, for Appellants.

L. L. Cory, Church & Cory, and Webb & Strother, for Respondent.

PATERSON, J.—This is an action to foreclose the lien of a material-man. The cause was commenced and determined in the superior court of Fresno County. The defendants, Frank J. and Charles Prudom, who were residents of San Joaquin County, appeared and filed an answer to the complaint on April 20, 1891. The case was tried on November 4, 1891, and a decree in favor of the plaintiff was entered on the same day. The decree recites that the defendants Prudom failed to appear at

the trial of the cause. On November 16, 1891, the defendants Prudom gave notice of an application to set aside the judgment, on the ground that it was taken against them through their mistake, inadvertence, and excusable neglect. In support of their motion, they filed an affidavit setting forth that neither they nor their attorney had any notice of the fact that the case has been set for trial until after the entry of the judgment; that they relied upon the belief that they were entitled to notice that the case had been set for trial, being non-residents of the county in which the action was pending; that the rules of the court specified no time for the calling of the calendar and the setting of the cases for trial; that in August, 1891, defendants' attorney sent a letter to the attorneys of plaintiff at Fresno, and requested them to inform him, as soon as the cause was set, of the time when it would be tried, and the defendants and their attorney believed that such request would be complied with, and that no advantage would be taken of their absence. The record does not show how long the case had been set for trial prior to November 4th.

We cannot say that the court abused its discretion in denying the motion to vacate the judgment. In *Eltzroth v. Ryan*, 91 Cal. 587, we held that no notice of the setting of a case for a trial is required by statute; that parties to an action and their attorneys, whether residents or non-residents of the county where the case is pending, must watch its progress, and are charged with notice of the fact that it has been set for trial. It is true, in that case it appeared that the rules of the superior court fixed a day for the calling of the calendar. They provided that either party might without notice have any case set down for trial, and that all parties would be deemed to have notice of the fact; but that circumstance is immaterial. A party is bound to know the rules of the trial court. If they fix a day for setting causes for trial, he is presumed to know the fact; and if they do not, he must govern himself accordingly, and learn from the proceedings of the court when his case is to be heard,

This rule may work hardship in some cases, and the court below should be liberal in relieving parties from judgments taken against them where they have acted without negligence and without actual notice of the time fixed for the trial; but ordinarily, a party will have no difficulty in ascertaining the day fixed for the trial. A request to the clerk, or the attorneys of his adversary, for notice of the fact will rarely be disregarded. There is nothing in the record to show that either the clerk or the attorney for plaintiff promised to notify the defendants. If such a promise had been made and relied on, the facts would present a cogent reason for setting aside the judgment taken against them. The stated rule is inconvenient and troublesome to non-resident litigants, but there is little danger that the results which counsel for appellants apprehends will follow its enforcement. Parties will not be forced to trial without a reasonable opportunity to prepare therefor. If a case has been set for trial at an unreasonably early day, and by reason thereof a party has been unable to be present or to prepare for trial, the court would abuse its discretion in refusing a continuance, or in refusing to set aside a judgment taken against him because of such hasty action.

It is claimed that the judgment should be reversed, because it directs the sale of the land described in the complaint without adjudging that it was all necessary for the convenient use and occupation of the building. In answer to this contention, it is sufficient to say that the complaint alleged that "all of said land is necessary for the convenient use and occupation of said building," and the court found this allegation to be true. It was not necessary to repeat the statement in the judgment.

It is also claimed that the judgment is erroneous, because it fails to adjudge that at the commencement of the action the land belonged to the person who caused the building to be constructed, or that it was erected with his knowledge; but here again the appellants overlook the allegation of the complaint and the findings of

the court. It is alleged in the complaint that Francis J. Prudom, at whose instance the building was erected, was at all times mentioned the owner and entitled to possession of the property, and that the other defendants claim to have some interest therein, "but the same is subsequent to the lien of plaintiff." These allegations were denied. The court found they were true.

Judgment affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 18025. Department One. — August 18, 1892.]

H. SACHSE, RESPONDENT, v. E. S. AUBURN ET AL.,
APPELLANTS.

MECHANIC'S LIEN — JUDGMENT OF FORECLOSURE — EXTENT OF LAND DECREED TO BE SOLD — PRESUMPTION UPON APPEAL — PLEADING — NECESSITY FOR CONVENIENT USE. — In an action to foreclose a mechanic's lien, where there is nothing in the record to show that the land described in the decree in favor of the plaintiff directing the land to be sold is greater in extent than that covered by the building, it will be presumed upon appeal in favor of the judgment that it was not greater in extent, and the judgment will not be reversed because of the absence of an allegation and finding that it was necessary for the convenient use and occupation of the building.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion of the court.

A. H. Carpenter, and S. J. Hinds, for Appellant.

L. L. Cory, Church & Cory, and Webb & Strother, for Respondent.

PATERSON, J.—This is an action to foreclose a mechanic's lien. The case differs from *Dusy v. Prudom*, ante, p. 646, this day filed, in one material respect only. There is neither an allegation nor a finding that all of the land which the decree directs to be sold is necessary for the convenient use and occupation of the building.

In *Green v. Chandler*, 54 Cal. 627,—the case upon which appellants rely,—it appeared that the structure in controversy was built upon a tract of land containing something over eight acres. The court found that the whole of said parcel with its appurtenances was required for the convenient use and occupation of the mill, etc. It was held on appeal that this finding was not within any of the issues made by the complaint and answer, and that there was no evidence upon which the court could determine that the whole or any particular part of the land was necessary for the use and occupation of the structure. It was apparent to the court in that case that the court below had decreed the sale of a larger tract of land than that actually occupied by the building upon which the lien was filed; and as there was no allegation, either in the complaint or in the answer, that all of the land was necessary for the convenient use and occupation of the building, the court held that the finding, being outside of any issue, did not warrant the judgment. In *Sidlinger v. Kerkow*, 82 Cal. 42, it did not appear that the plaintiff was claiming any more land than that occupied by the building, and we held that the failure of the court to define the exact amount or extent of the land necessary for the convenient use of the structure did not invalidate the decree that the purchaser would acquire only the land covered by the building. The land actually occupied by the building is necessarily subject to the lien, and it is only where the plaintiff claims that more than that is required for its use and occupation, that he must make averments therefor. (*Willamette S. M. Co. v. Kremer*, 94 Cal. 205.) There is nothing in the record in this case to show that the land described in the decree is greater in extent than that covered by the building. We have to assume that it is not. Every presumption must be indulged in favor of the judgment.

Judgment affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 14524. Department One — August 18, 1892.]

F. H. WILLIAMSON, RESPONDENT, v. THE CUMMINGS ROCK DRILL COMPANY, APPELLANT.

JUDGMENT BY DEFAULT — APPLICATION TO VACATE — EXCUSABLE NEGLECT — DISCRETION — APPEAL. — Applications to the trial court to set aside a judgment by default, upon the ground of excusable neglect, are addressed to the sound legal discretion of the trial court, and the order of that court, in granting or denying the motion, will not be disturbed upon appeal, unless an abuse of discretion is shown.

ID. — INSUFFICIENT SHOWING — MISTAKE IN MARKING TIME FOR ANSWER — NUMEROUS ACTIONS. — It cannot be said to be an abuse of discretion for the trial court to refuse to set aside a judgment by default, upon the ground of excusable neglect, where the affidavits merely show that there were several actions between the same parties, and that when the defendant's attorney received the summons and copy of complaint, he marked the papers "Answer due April 23d," whereas it was due the 21st, and the only reason for his not having filed the answer was his mistake in marking the papers, and owing to the fact that there were so many actions against the defendant.

ID. — PROOF OF SERVICE OF SUMMONS — AFFIDAVIT — IMMATERIAL FACTS — CITIZENSHIP — CERTIFIED COPY. — A judgment by default is not erroneous because the affidavit of service of summons fails to show that the person making the service was a white male citizen of the United States, or that he served a certified copy of the complaint, as neither of these things are necessary.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing to set it aside.

The facts are stated in the opinion of the court.

Ash & Matthews, for Appellant.

W. Rigby, for Respondent.

The Court.—The summons herein was served on the defendant April 9, 1891, and on April 21, 1891, the defendant having failed to appear and answer the complaint, judgment by default was entered against him by the clerk on motion of the plaintiff's attorney. Two days thereafter the defendant moved the court to set aside the default and judgment, upon the ground of excusable neglect; and in support thereof presented an affidavit of merits, and also an affidavit of its attorney,

showing that there were several causes between the same parties, and that when he received the summons and copy of complaint herein from the defendant, he marked the papers "Answer due April 23, 1891." Upon the hearing the court denied the motion, and the defendant has appealed.

Applications of this nature are addressed to the sound legal discretion of the court below, and the order of that court, either in granting or denying the motion, will not be disturbed by this court, unless the appellant shall make it appear to have been so clearly erroneous as to amount to an abuse of discretion. (*Bailey v. Taaffe*, 29 Cal. 422; *Coleman v. Rankin*, 37 Cal. 249; *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 20; *Garner v. Erlanger*, 86 Cal. 62.) In *Reidy v. Scott*, 53 Cal. 69, it was shown that at the time of the service of summons upon him, the defendant was sick and unable to attend to business, and that as soon as he was able to be out he delivered the summons to his attorneys, and stated to them that he had received it on the 26th of April, as he then believed, whereas, in fact, the service was on the 25th of April. Judgment by default was entered against the defendant before nine o'clock on the morning of May 7th (the 6th being Sunday), and shortly after nine o'clock on the same day, without any knowledge or notice of such judgment, his answer setting up a meritorious defense was filed with the clerk, and upon this showing it was held that the court should have set aside the default. In the present case, however, it does not appear that there was any mistake on the part of the defendant as to the day when the summons was served upon it, or that the attorney was not properly informed of that day; nor did the attorney give any reason why he marked the papers "Answer due April 23d"; and the only reason presented for his not having filed the answer is "his mistake in marking said papers as afore-said, and owing to the fact that there were so many cases against said defendant." This cannot be regarded as excusable neglect.

The contention of the appellant, that the judgment cannot be sustained for the reason that the affidavit of service fails to show that the individual by whom the service was made was a white male citizen of the United States, or that he served a certified copy of the complaint, is sufficiently met by the terms of section 410 of the Code of Civil Procedure, which authorizes the service to be made by the sheriff, "or by any other person over the age of eighteen, and not a party to the action," and which does not require that the copy of the complaint shall be "certified."

The judgment and order are affirmed.

[No. 20892. Department One. — August 19, 1892.]

THE PEOPLE, RESPONDENT, v. AH SING, APPELLANT.

CRIMINAL LAW — ROBBERY — INFORMATION — POSSESSION BY PERSON

ROBBED. — An information charging a defendant with the taking of property by force from the person of the prosecutor, and against his will, and that the property was his personal property, sufficiently shows the possession of the property by him, and states facts sufficient to constitute the crime of robbery.

1D. — PARTICULARITY OF AVERMENT — DEFECT OF FORM. — Under the provisions of the Penal Code, the particularity of averment in an information necessary at common law is not required. It is only necessary that the substantial facts constituting the crime shall be alleged with sufficient certainty to enable the court to pronounce a proper judgment and the party to defend against the charge. Any defect of form not tending to the prejudice of a substantial right of the defendant must be disregarded.

1D. — INSTRUCTION — FALSE TESTIMONY — RIGHT OF JURY TO DISREGARD WITNESS. — An instruction in a criminal prosecution, to the effect that if the jury should believe that any witness had sworn falsely as to any fact in the case they were at liberty to entirely disregard the testimony of such witness, is not erroneous.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

C. C. Stephens, F. B. Guthrie, H. H. Appel, and Willis & Appel, for Appellant.

The information is insufficient, as it fails to charge the taking of the property from the possession of any one. (Pen. Code, sec. 211; *Polack v. McGrath*, 32 Cal. 20; *Rex v. Edwards*, 6 Car. & P. 521.) The court erred in instructing the jury that if they believed from the evidence that any witness had sworn falsely to any fact in the case they would be at liberty to disregard his testimony. (*Pierce v. State*, 53 Ga. 365, 368; *Moresi v. Swift*, 15 Nev. 231; *McLean v. Clark*, 47 Ga. 24; *Fishel v. Lockard*, 52 Ga. 632; *People v. Sprague*, 53 Cal. 494.)

Attorney-General W. H. H. Hart, Deputy Attorney-General Charles H. Jackson, and District Attorney James McLachlan, for Respondent.

The information is in the language of the statute, and is sufficient. (*People v. Harrold*, 84 Cal. 570; *People v. Rozelle*, 78 Cal. 84.) It is sufficient if the offense is substantially charged in the language of the code. (*People v. Mahlman*, 82 Cal. 585; *People v. Rozelle*, 78 Cal. 84; Pen. Code, secs. 49, 59, 1258, 1404; *People v. Tonielli*, 81 Cal. 279; *People v. O'Brien*, 64 Cal. 53.)

GAROUTTE, J.—Appellant was convicted of the crime of robbery, and now asks this court for a reversal of the judgment and a new trial.

It is insisted that the information does not state facts sufficient to constitute the crime of robbery, in this, it is charged that the defendant did “steal, take, and carry away from the person of one Tom She Bin,” etc. Robbery is defined to be the “felonious taking of personal property in the *possession of another* from his person or immediate presence.” The information alleges that the property was taken by force from the person of Tom She Bin, and against his will, and was his personal property. These facts fairly show a possession of the property in the prosecuting witness.

In framing an information, the statute should be carefully followed, and such would have been the better practice in this instance; but we think the present defect

more technical than substantial, more apparent than real. This court said in *People v. Rozelle*, 78 Cal. 84: "Under the provisions of the Penal Code, the particularity of averment necessary at common law is not required. It is only necessary that the substantial facts constituting the crime shall be alleged with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge. . . . Any defect of form not tending to the prejudice of a substantial right of the defendant must be disregarded."

The evidence is amply sufficient to support the verdict. The definition of robbery given by the court in its charge to the jury was too favorable to the appellant, and he has no cause for complaint.

It is insisted that the following instruction is erroneous: "If you believe that any witness has sworn falsely as to any fact in this case, then you are at liberty to entirely disregard the testimony of such witness." The instruction is substantially in the language of the code, and has been approved in many cases. (See *People v. Treadwell*, 69 Cal. 226.) Even if appellant's contention be true, that the false evidence must be as to material matters, then the instruction still comes within such rule, for it refers to "*any fact*" in the case. The assignments of error based upon the evidence of impeachment of the defendant, and also upon the matter of *alibi*, are not well taken; neither can we say from the record that the motion for a new trial was improperly denied.

There appears to be no merit in the appeal. Let the judgment and order be affirmed.

PATERSON, J., and HARRISON, J., concurred.

[No. 20904. Department One. — August 19, 1892.]

THE PEOPLE, RESPONDENT, v. AH SING, APPELLANT.

CRIMINAL LAW — TIME FOR FILING INFORMATION — RETURN OF DEPOSITIONS AND COMMITMENT — MOTION FOR DISCHARGE — DISCRETION. — A motion in a criminal prosecution to discharge the defendant, because the information was not filed within thirty days after he was held to answer, may be denied in the discretion of the court, where it appears that at the time of the making of the motion the depositions and commitment thereon, upon which the information was based, had not been returned to the court by the committing magistrate.

ID. — PERJURY — TESTIMONY UPON TRIAL — MATERIALITY TO THE ISSUE. — In order to constitute the offense of perjury, alleged to have been committed in the giving of testimony upon a trial, it is not only necessary that the testimony should be false, but it must also appear that the testimony was material to the issue on trial. Testimony given as to matters collateral to the question at issue cannot furnish the foundation for a charge of perjury.

ID. — ALLEGATION AND PROOF OF MATERIALITY. — The materiality of the evidence in such a case is not only a necessary element of the information, but it is a fact which must be established by the evidence of the prosecution as fully and completely as any other fact in the case.

ID. — PERJURY UPON EXAMINATION OF ANOTHER CHARGED WITH PERJURY — FALSE CHARGE OF LARCENY — IMMATERIAL TESTIMONY. — Upon a prosecution for perjury, alleged to have been committed by the defendant at the preliminary examination before a justice of the peace, of another person also charged with perjury, where it appears that the complaint against the latter alleged that he committed perjury in swearing to a complaint falsely charging another person with petit larceny, but it does not appear what property was charged to have been stolen, and the only specification of perjury against the defendant is that he falsely testified that he saw the person charged with the larceny "take a bracelet" belonging to the person charged with perjury, it does not appear that such testimony was material upon the examination for perjury, and the evidence fails to support a judgment of conviction of the defendant.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Augustus A. Montaño, for Appellant.

The defendant's motion to dismiss and to discharge the defendant from custody, upon the ground that the

information was not filed within thirty days after his preliminary examination, should have been granted. (*People v. Morino*, 85 Cal. 515; Pen. Code, secs. 809, 876, 1382.) The defendant was not guilty of perjury, as the testimony which he was charged to have given was not material to the case. (Pen. Code, sec. 118; *Commonwealth v. Pollard*, 12 Met. 225; *State v. Aikens*, 32 Iowa, 403; *Nelson v. State*, 32 Ark. 192.) The materiality of the testimony must be established by the evidence, and cannot be left to presumption or inference. (*State v. Aikens*, 32 Iowa, 403; *Nelson v. State*, 32 Ark. 192; *Commonwealth v. Pollard*, 12 Met. 225.)

Attorney-General W. H. H. Hart, Deputy Attorney-General Charles H. Jackson, and District Attorney James McLachlan, for Respondent.

It was in the discretion of the court to refuse to discharge the defendant. (Pen. Code, sec. 1382; *People v. Camilo*, 69 Cal. 540.) As the evidence was conflicting, and there was some evidence tending to prove the charge, the judgment should be affirmed. (Hayne on New Trial and Appeal, sec. 288; *Lick v. Madden*, 36 Cal. 213; 95 Am. Dec. 175; *People v. Mayes*, 66 Cal. 597; 56 Am. Rep. 126; *Wilson v. Fitch*, 41 Cal. 385; *People v. Estrada*, 53 Cal. 601.) Convictions were sustained in the following cases: *Bailey v. Commonwealth*, 82 Va. 107; 3 Am. St. Rep. 87; *Fry v. Commonwealth*, 82 Va. 334; *Glover v. Commonwealth*, 86 Va. 382.

GAROUTTE, J.—The appellant, Ah Sing, was convicted of perjury, and now asks this court to review the judgment and order denying his motion for a new trial.

The demurrer to the information was properly overruled, and we cannot say that the motion to discharge the defendant, by reason of the fact that the information was not filed within thirty days after the defendant was held to answer, should have been granted. An information filed by the district attorney against an accused is based upon the depositions and commitment thereon

returned by the committing magistrate to the clerk of the superior court. It appears that at the time this motion was made these papers had not been returned to the court by the committing magistrate, and the trial court denied the motion upon that state of facts. It does not appear that such ruling was not made under a proper exercise of judicial discretion.

The charge of perjury, upon which the appellant was convicted, is alleged to have been committed at the preliminary examination of one Ah Wai, who was being examined before a justice of the peace upon a complaint also charging perjury. The complaint against Ah Wai alleged that he committed perjury in swearing to a complaint falsely charging one Kio Kiang with having committed the crime of petit larceny. The false testimony, upon which the present charge of perjury is based, is set out in the information, but as to the major portion of it, the record does not disclose sufficient evidence to support it as a fact, and if proven, it is quite apparent that under no circumstances could it be material to the issue under examination in the trial of Ah Wai. The only specification of perjury set out in the information which demands our consideration is the following: "That on the sixteenth day of April, 1891, he, the said Ah Sing, saw one Kio Kiang, a Chinese woman, take a bracelet belonging to one Ah Wai, from the house of one Ah Sing, in the city of Pomona, in the county of Los Angeles." Conceding that the record discloses the complete falsity of the foregoing testimony of the accused, given at the trial of Ah Wai, still, in order to constitute the offense of perjury, another and additional element is necessary, and that is, it must appear that such testimony was material to the issue on trial. It is an elementary principle that testimony given as to matters collateral to the question at issue cannot furnish the foundation for a charge of perjury, and this principle of law was recognized here by the district attorney in framing the information, and by the court throughout its charge to the jury. Its materiality is not only a necessary element of

the information, but it is a fact which must be established by the evidence of the prosecution as fully and completely as any other fact in the case. We find no evidence in the record to indicate that the foregoing testimony of the accused was material to the issue upon trial at that time. We know that Ah Wai was being examined upon an accusation of perjury, in having sworn to a complaint falsely charging one Kio Kiang with petit larceny, and that is the extent of our knowledge upon the subject. As to what property Kio Kiang was charged by Ah Wai with having stolen, there is a total absence of proof. If the charge made against Kio Kiang was for stealing money, then at the examination of Ah Wai upon a complaint for perjury in making such false charge, this testimony of the defendant was entirely immaterial, and no conviction for perjury could stand against him for a moment. It is only upon the theory or presumption that the perjury charge against Ah Wai was based upon a false accusation against Kio Kiang in stealing a bracelet, the property of Ah Wai, that the testimony was material at the preliminary examination. But, as already suggested, the burden was upon the people to establish such matter as a fact, and the jury were not entitled to speculate upon theories, or indulge in presumptions and inferences against the defendant upon a question so important. The evidence in this particular fails to support the judgment.

The charge of the court to the jury is full and complete, and we find no just grounds of exception thereto.

For the foregoing reasons, let the judgment and order be reversed, and the cause remanded for a new trial.

PATERSON, J., and HARRISON, J., concurred.

[No. 14785. Department One. — August 19, 1892.]

THOMAS FRASER, APPELLANT, v. D. A. OTT, RESPONDENT.

BOUNDARY — CENTER OF HIGHWAY — PRESUMPTION — EFFECT OF DEED. —

An owner of land bounded by a road or street is presumed to own to the center of the way, and when one conveys land bounded by a highway, he passes his title to the center of the highway, subject to the public easement, unless a different intent appears from the grant.

ID. — GRANT OF TWO ACRES OF BLOCK ADJOINING STREET — DESCRIPTION —

MEASUREMENT OF QUANTITY. — A conveyance of two acres of a block adjoining a street passes title to half of the adjoining street, subject to the public easement; but it does not necessarily follow that the two acres must be measured by going to the center of the street; and if the deed describes the blocks as four-acre blocks, which appears to be the size of the blocks, exclusive of the adjoining streets, the description of the north two acres of a specified block in effect describes the north half thereof, exclusive of the street, especially where the deed describes a right of way as conveyed over the east end of the south half of the same block.

ID. — DEFINITION OF "BLOCK." — A "block" is a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots, and this is the meaning of the word as used in a conveyance of the north two acres of a four-acre block.

APPEAL from a judgment of the Superior Court of Orange County, and from an order granting a new trial.

E. E. Keech, for Appellant.

F. O. Daniel, for Respondent.

BELCHER, C.—This is an action to quiet the plaintiff's title to a parcel of land, and the material facts, shown by the record, are as follows:—

On July 29, 1889, one George B. Lyon was the owner of a block of land situate in the town of Santa Ana East, in the county of Orange, and on that day conveyed to the plaintiff, by a bargain and sale deed, a portion thereof, described as follows: "The same being the north two acres of block No. thirteen (13) of the Western Development Company's four (4) acre blocks in the town of Santa Ana East, as per map of said Santa Ana East recorded in book 10, pages 43 and 44 of the miscellaneous records of Los Angeles County, California; also the right of way, for street purposes only, over twenty feet of land off the

east end of the south half of said block 13 in said town of Santa Ana East aforesaid."

Immediately after executing the aforesaid deed, Lyon executed and delivered to defendant D. A. Ott a contract, by which he bound himself to sell and convey to Ott the balance of the said block upon certain terms and conditions.

The block in question is one of fifteen adjoining blocks, laid out by the Western Development Company, and is bounded on the west and south by streets sixty feet wide. Measuring to the center of these streets, it contains 4.65 acres, but excluding the streets it contains 4.04 acres only.

Lyon died before this action was commenced, but his contract with Ott remained in full force, and was binding upon his legal representatives and heirs when the case was tried.

In his complaint the plaintiff alleged that he was the owner and in possession of the north half of the said block, together with the right of way for street purposes over twenty feet of land off the east end of the south half thereof; that the defendants, D. A. Ott and the executors and heirs of Lyon, and each of them, claimed an estate or interest in the said premises adverse to the plaintiff, but that they had no estate or interest therein, and their said claims were without any right whatever.

By his answer, the defendant Ott denied that the plaintiff was in possession of, or had any title to, or any estate or interest in, the land and premises described in his complaint; and further denied that defendant's claim to the said land was without right. And for a further and separate answer, the said defendant then set up his contract with Lyon, and alleged that under and by virtue of said contract he claimed an interest in all of the said block of land, except the north two acres thereof, and that he claimed no interest or estate of any kind in or to the said north two acres, and no interest adverse to the plaintiff to the right of way for street purposes, while

used as such, over twenty feet off the east end of the south half of said block.

The other defendants answered, but their answers need not be considered.

The case was tried, and the court found as follows:

"1. That the plaintiff, at the time of the bringing of this action, and for some time prior thereto, was and still is the owner in fee of that certain parcel of land situate in the county of Orange, state of California, and described as follows, to wit: The north two acres of block 13 in Santa Ana East, which north two acres do not include any portion of the street adjoining said block on the west side thereof, but containing two acres exclusive of said street.

"2. That the defendants, and each of them, claim an estate and interest to a strip on and along the south side of said two acres, nineteen feet wide, which claim and interest are adverse to that of the plaintiff.

"3. That the claim of the said defendants, and each of them, to the said strip on and along the south side of said two acres is without any right whatever," etc.

In accordance with these findings, judgment was duly given and entered in favor of the plaintiff. The defendant Ott then moved for a new trial upon a statement of the case. Attached to the statement were specifications, in substance, that findings 1 and 2 were not justified by the evidence, because, as shown by the evidence, the plaintiff's north two acres of the block should be measured by extending the same to the center of the adjacent street on the west; that finding 2 was not justified, because there was no evidence upon which it could be based; and that certain errors in law were committed by the court in its rulings upon the admission of evidence.

The court granted the motion, but upon what ground does not appear, and from this order the plaintiff has appealed.

The principal question discussed by counsel is as to the location of the west boundary line of appellant's two acres; and while the attorney for respondent claims that,

under the pleadings, the trial court had no authority to decree appellant anything more than the north two acres of the block, without any allusion to streets, still he says: "If this court should hold that the pleadings are so framed as to authorize the court to decide the question appellant contends for, i. e., whether or not appellant must go to the center of the street on the west to get his two acres, I will be glad to have this court settle it."

At the trial the appellant offered in evidence his deed from Lyon, and the map referred to therein, and then rested his case. This map showed that along the sides of some of the blocks laid out thereon streets were marked out, and that along the sides of others no streets were marked.

The respondent introduced in evidence his contract with Lyon, and then called the county surveyor as a witness. The witness testified, in substance, that he had measured block 13, as shown on the map, and that it contained the number of acres and fractions of an acre above stated, and also that in order to make this block the same size as the other blocks around which no streets were marked, it was necessary to measure to the center of the adjoining streets.

The foregoing was all the material evidence in the case, and upon it the court made its findings and rendered its judgment.

Looking, then, at the evidence, the findings, the specifications attached to the statement, and the briefs of counsel, it seems apparent that the real and only controversy at the trial was as to the true location of the appellant's south line, and that this depended upon the location of his west line. Under these circumstances, we think the court was authorized to determine the question contested by the parties, and that the respondent cannot now be heard to object that it was not sufficiently raised by the pleadings.

The question, then, is as to the construction to be given to appellant's deed. It is true, as claimed by respondent, that an owner of land bounded by a road or street is

presumed to own to the center of the way (Civ. Code, sec. 831); and when one conveys land bounded by a highway, he passes his title to the center of the highway, unless a different intent appears from the grant. (Civ. Code, sec. 1112.) And it has been held that a deed describing land as bounded "by" "upon," or "along" a street or highway should be construed, if practicable, upon grounds of public policy, as including the land to the center of the street or highway. (*Moody v. Palmer*, 50 Cal. 31.) It may be conceded, therefore, that when Lyon conveyed the north two acres of block 13 to appellant, he owned, and, subject to the public easement, passed the title, to the east half of the adjoining street.

This being so, respondent contends that as there are no words in the deed limiting the grant to the east side of the street, the two acres must be measured by going to the center thereof.

We do not think this conclusion follows. As we understand it, the tract of land laid out by the Western Development Company was intended to be made an addition to the city of Santa Ana; and the blocks were to be sold and used for residence or business purposes. The subdivisions were all of the same size, and doubtless it was intended that the blocks to be built upon should also be of the same size, after the streets necessary to make them accessible should be laid out and established. Some of the necessary streets were not marked out on the map, but this we do not consider of any importance. The deed speaks of the blocks as *four-acre* blocks, and that is shown to be practically the size of the block in question, exclusive of the adjoining streets. Ordinarily, no two surveyors exactly agree in their measurements of land, and the variance of four hundredths of an acre may easily be accounted for in that way. The deed, then, by describing the land to be conveyed as the north two acres of the block, in effect described the north half thereof; and that such was the intention of the parties is further shown by the description of the right of way,

conveyed over the east end of the *south half* of the same block.

One of the definitions of the word "block" given by Webster is: "A square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots"; and this, in our opinion, was the meaning of the word as used in the deed to appellant. The court therefore rightly found that appellant was the owner of the north two acres of block 13, exclusive of the street, and that respondent claimed an interest therein adverse to him.

We see no error in the rulings of the court complained of. The testimony objected to and excluded was irrelevant and immaterial.

It results, in our opinion, that the court erred in granting the motion for a new trial, and that the order should be reversed.

VANOLIEF, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is reversed.

PATERSON, J., HARRISON, J., GABOUTTE, J.

Hearing in Bank denied.

[No. 20901. Department One. — August 22, 1892.]

THE PEOPLE, RESPONDENT, v. CHARLIE LEE KONG,
APPELLANT.

CRIMINAL LAW — ASSAULT WITH INTENT TO MURDER — ABSENCE OF PERSON INTENDED TO BE KILLED. — Where a policeman bored a hole in the roof of a building for the purpose of determining from observation whether or not the occupant was conducting therein a gambling or lottery game, and the occupant, having ascertained the fact, and believing that the policeman was on the roof at the point of contemplative observation, fired his pistol at that spot, with the intent to kill, he is guilty of an assault with intent to commit murder, although the officer was not at the spot when the shot was fired, but was upon another part of the roof.

12. — UNKNOWN OBSTRUCTIONS TO CRIMINAL ATTEMPT. — Where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed.
13. — ASSAULT — ATTEMPT COUPLED WITH ABILITY. — In order to be guilty of an assault, there must be an unlawful attempt coupled with a present ability to accomplish the act intended.
14. — ABILITY TO ACCOMPLISH MURDER — LOADED PISTOL — MISTAKE AS TO LOCATION OF VICTIM. — A person has the present ability to accomplish the murder intended, when he has a loaded pistol, and the person intended to be fired at is within reach of its effect, and the fact that he was mistaken as to the exact spot where his victim was located at the time of firing is immaterial.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

C. C. Stephens, and *H. C. Grant*, for Appellant.

Attorney-General W. H. H. Hart, for Respondent.

GAROUTTE, J. — Appellant was convicted of the crime of an assault with intent to commit murder, and now prosecutes this appeal, insisting that the evidence is insufficient to support the verdict.

The facts of the case are novel in the extreme, and when applied to principles of criminal law, a question arises for determination upon which counsel have cited no precedent.

A policeman secretly bored a hole in the roof of appellant's building, for the purpose of determining, by a view from that point of observation, whether or not he was conducting therein a gambling or lottery game. This fact came to the knowledge of appellant, and upon a certain night, believing that the policeman was upon the roof at the contemplated point of observation, he fired his pistol at the spot. He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but very fortunately for the officer of the law, at the moment of attack he was upon the roof at a different spot, viewing the scene of action,

and thus no substantial results followed from appellant's fire.

The intent to kill is quite apparent from the evidence, and the single question is presented, Do the facts stated constitute an assault? Our criminal code defines an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." It will thus be seen that to constitute an assault two elements are necessary, and the absence of either is fatal to the charge. There must be an unlawful attempt, and there must be a present ability, to inflict the injury. In this case it is plain that the appellant made an attempt to kill the officer. It is equally plain that this attempt was an unlawful one. For the intent to kill was present in his mind at the time he fired the shot, and if death had been the result, under the facts as disclosed, there was no legal justification to avail him. The fact that the officer was not at the spot where the attacking party imagined he was, and where the bullet pierced the roof, renders it no less an attempt to kill. It is a well-settled principle of criminal law in this country, that where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny. (*State v. Wilson*, 30 Conn. 500; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *People v. Moran*, 123 N. Y. 254.)

Having determined that appellant was guilty of an unlawful attempt to kill, was such attempt coupled with the present ability to accomplish the deed? In the case of *People v. Yslas*, 27 Cal. 633, this court said: "The common-law definition of an assault is substantially the same as that found in our statute." Con-

ceding such to be the fact, we cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear. Under our statute it cannot be said that a person with an unloaded gun would have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be. It was held in the case of *State v. Swails*, 8 Ind. 722, that there was no assault to commit murder where A fires a gun at B at a distance of forty feet, with intent to murder him, if the gun is in fact loaded with powder and a slight cotton wad, although A believes it to be loaded with powder and ball. The later Indiana cases support this rule, although in *Kinkle v. State*, 32 Ind. 230, the court, in speaking of the *Swail's* case, said: "But if the case is to be understood as laying down the broad proposition that to constitute an assault . . . with intent to commit felony the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval." In the face of the fact that the statute of this state in terms requires that in order to constitute an assault the unlawful attempt and present ability must be conjoined, *Kinkle v. State*, 32 Ind. 230, can have no weight here. In *State v. Napper*, 6 Nev. 115, the court reversed the judgment upon the ground that the people failed to prove that the pistol with which the assault was alleged to have been made was loaded, and that consequently there was no proof that the defendant had the present ability to inflict the injury.

It is not the purpose of the court to draw nice distinctions between an attempt to commit an offense and an assault with intent to commit the offense, for such distinctions could only have the effect to favor the escape of criminals from their just deservings. And in view of

the fact that all assaults to commit felonies can be prosecuted as attempts, we can see no object in carrying the discussion of the subject to any greater length.

In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part; neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol, and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault. These acts disclose an assault to murder as fully as though a person should fire into a house with the intention of killing the occupant, who fortunately escaped the range of the bullet. (See *Cowley v. State*, 10 Lea, 282.) The fact that the shots were directed indiscriminately into the house rather than that the intended murderer calculated that the occupant was located at a particular spot, and then trained his fire to that point, could not affect the question. The assault would be complete and entire in either case. If a man intending murder, being in darkness and guided by sound only, should fire, and the bullet should pierce the spot where the party was supposed to be, but by a mistake in hearing the intended victim was not at the point of danger, but some distance therefrom, and yet within reach of the pistol-ball, the crime of assault to commit murder would be made out; for the unlawful attempt and the present ability are found coupled together. If appellant's aim had not been good, or if through fright or accident when pointing the weapon or pulling the trigger, or if the ball had been deflected in its course

from the intended point of attack, and by reason of the occurrence of any one of these contingencies the party had been shot and killed, a murder would have been committed. Such being the fact, the assault is established.

The fact of itself that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant at the time the shot was fired, is immaterial upon this question. That element of the case does not go to the question of present ability, but pertains to the unlawful attempt.

Let the judgment and order be affirmed.

PATERSON, J., concurred.

HARRISON, J., concurring. — I concur in the judgment, upon the ground that upon the evidence before them the jury have determined that the unlawful attempt of the defendant was coupled with a present ability — that is, an ability by the means then employed by him in furtherance of such attempt — to commit murder upon the policeman.

[No. 14581. Department Two. — August 19, 1892.]

IN THE MATTER OF THE ESTATE OF JAMES H. BACKUS.

ORDER REFUSING PROBATE OF WILL — TIME FOR APPEAL — DISMISSAL. — An appeal from an order refusing probate to a will should be taken within sixty days after the entry of the judgment, and an appeal taken thereafter will be dismissed.

APPEAL from a judgment of the Superior Court of Ventura County.

The facts are stated in the opinion of the court.

J. Marion Brooks, and *E. W. McKinstry*, for Appellants.

Barnes & Selby, *Orestes Orr*, *L. C. McKesly*, and *T. O. Toland*, for Respondents.

SHARPSTEIN, J. — Appellants, who style themselves “proponents of the last will and testament of James H. Backus, deceased,” appeal from a judgment entered May 29, 1890, refusing probate to said will.

The notice of appeal is dated May 25, 1891, and on that day was served. Section 1715 of the Code of Civil Procedure provides that the appeal in such a case must be taken within sixty days after the order, decree, or judgment is entered. This appeal was not taken until nearly a year afterwards, and counsel for respondent claim in their points and authorities that it should be dismissed. The question has been repeatedly before this court, and it has uniformly been held that such appeals must be taken within the time prescribed by section 1715 of the Code of Civil Procedure. (*Estate of Burns*, 54 Cal. 223; *In re Grider*, 81 Cal. 574; *In re Wiard*, 83 Cal. 619; *In re Fisher*, 75 Cal. 523; *Estate of Harland*, 64 Cal. 379; *Estate of Burton*, 64 Cal. 428; *In re Sanderson*, 74 Cal. 199.)

Appeal dismissed.

DE HAVEN, J., and McFARLAND, J., concurred.

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ACCOUNT. See **INSOLVENCY**; **PARTNERSHIP**, 9, 10.

ADVERSE POSSESSION.

1. **CO-TENANCY — QUESTIONS OF FACT.** — Whether a party, claiming title to land by adverse possession, entered into the possession acknowledging himself to be a co-tenant, or whether he entered claiming the whole title, and whether his possession thereafter was adverse and of such notoriety that his alleged co-tenants must be presumed to have known of his exclusive ownership, are questions of fact for the trial court to determine from all the circumstances. — *Alvarado v. Nordholt*, 116.
2. **EVIDENCE OF OUSTER OF CO-TENANT — ENTRY UNDER ADMINISTRATOR'S DEED — NOTICE OF EXCLUSIVE OWNERSHIP.** — Evidence that the defendants in an action of ejectment, and their predecessors, received all the rents of the property, and paid all taxes assessed against it, for over twenty years, and paid all street-improvement assessments charged thereon, and that the predecessor of the defendants entered under an administrator's deed of the land, and always claimed to be the owner of the property, and that his claim was open and notorious, and generally known to the community, warrants the court in finding an ouster of alleged co-tenants, and that they had notice of his claims of exclusive ownership, and that his possession was adverse to them. — *Id.*
3. **STATUTE OF LIMITATIONS — DISABILITY — INFANCY — SUSPENSION OF STATUTE.** — Where a person who could have maintained an action to recover her interest in land during her lifetime dies, the running of the statute of limitations is not suspended during the minority of one who claims the property under the decedent. — *Id.*

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ADULTERY. See **DIVORCE**, 1, 2.

AFFIDAVIT OF MERITS. See **PLACE OF TRIAL**, 1, 2.

AGENCY.

1. **AUTHORITY TO BORROW MONEY — INFERENCE FROM EMPLOYMENT.** —

If the transaction of business carried on by an agent for his principal absolutely requires the exercise by the agent of the power to borrow money in order to carry it on, such power is impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution

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of the duties really delegated, in order to justify its inference from the original employment. — *Consolidated National Bank v. Pacific Coast Steamship Co.*, 1.

2. NECESSITY OF BORROWING MONEY — PRESUMPTION — USUAL COURSE OF BUSINESS — EXPRESS AUTHORITY. — Where the authority of an agent to borrow money is denied by the principal, and it is proved that there was no necessity for borrowing money to effect any purpose of the agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority. — *Id.*
3. OSTENSIBLE AUTHORITY — LOCAL AGENT OF STEAMSHIP COMPANY — OVERDRAFT. — There is no ostensible authority to a local agent of a steamship company to borrow money or overdraw from a bank, where it appears that its general agents had no notice that the local agent had an account with the bank, or had ever overdrawn the account or borrowed money from the bank, and that they had furnished the local agent with a safe in which to keep the money collected by him, and where it further appears that the bank did not notify the general agents of the over-draft, but dealt with the local agent only, and accepted his individual promises to pay the over-drafts. — *Id.*

See EVIDENCE, 2; VENDOR AND VENDEE, 4.

ALIMONY. See DIVORCE, 13-40

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APPEAL.

1. APPELLATE JURISDICTION OF SUPREME COURT — ORDER AFTER JUDGMENT INVOLVING LESS THAN THREE HUNDRED DOLLARS. — The question whether or not the supreme court has jurisdiction of an appeal from a separate, independent order, made after final judgment, involving money only, and in an amount less than three hundred dollars, considered, but not decided. — *Sellick v. De Carlow*, 644.
2. ORDER REFUSING PROBATE OF WILL — TIME FOR APPEAL — DISMISSAL. — An appeal from an order refusing probate to a will should be taken within sixty days after the entry of the judgment, and an appeal taken thereafter will be dismissed. — *Estate of Backus*, 671.
3. APPEALABLE ORDER — ORDER REFUSING TO VACATE ORDER FOR WRIT OF POSSESSION — MOTION BY STRANGER TO RECORD. — An appeal lies from an order denying the motion of one not a party to the record to vacate or modify an order for a writ of possession. — *Green v. Hubbard*, 89.
4. STAY OF EXECUTION — DUTY OF COURT TO FIX BOND — MANDAMUS. — One having a right of appeal from such order may insist upon the duty of the court to fix the amount of the undertaking necessary to stay the operation of the writ of possession, under section 945 of the Code of Civil Procedure, and the discharge of such duty may be compelled by writ of mandata. — *Id.*
5. MERITS OF APPEAL NOT CONSIDERED. — Upon application for a writ of mandata to compel the court to fix the amount of a bond to stay

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execution, the merits of the ruling appealed from cannot be considered. — *Id.*

6. APPEAL FROM JUDGMENT — PRESUMPTION — FINDINGS — FORECLOSURE OF MORTGAGE — STREET ASSESSMENT — ASSIGNMENT OF MORTGAGE — DEFICIENCY JUDGMENT AGAINST ASSIGNOR. — When an appeal is taken upon the judgment roll alone, without any bill of exceptions or findings of fact, in an action by an assignee of a mortgage to foreclose the mortgage, and also a street assessment lien purchased by him to protect his mortgage interest, and it appears that the assignor of the mortgage denied the validity of the assessment, the presumption, from a judgment refusing to enforce the assessment against the assignor in a deficiency judgment against him, must be, that the court found in his favor on the issue as to the validity of the street assessment, though the judgment makes the lien a charge upon the mortgaged property as against the other defendants who admitted the allegations of the complaint. — *Crane v. Forth*, 88.
7. COSTS — DISALLOWANCE — PRESUMPTION AS TO COST BILL. — Upon an appeal from a judgment not providing for costs, taken upon the judgment roll alone, without any bill of exceptions or statement, where it does not appear that the prevailing party filed or served any cost bill, nor that he in any manner moved the court, either before or after final judgment, to allow him costs, it cannot be presumed that he filed or served any cost bill, but must be presumed that the judgment is correct; and an objection that the court erred in refusing a judgment for costs will not be considered. — *Id.*
8. MODE OF ASSAILING ERROR AS TO COSTS. — An error of the trial court in denying a party costs *before* final judgment should be shown by a bill of exceptions, or a statement on motion for a new trial. An erroneous order *after* final judgment, relating to costs, can only be considered upon an appeal from such order. — *Id.*
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10. UNDERTAKING — NEW-TRIAL ORDER NOT REFERRED TO — DISMISSAL — STIPULATION — ESTOPPEL. — Although, as a general rule, an appeal from a new-trial order must be dismissed where the undertaking on appeal from the judgment does not refer to the order, and there is no undertaking on appeal from the order, yet where a respondent stipulated in writing, within sixty days after the overruling of the motion for a new trial, that the appellant had in due time given and filed a good and sufficient undertaking upon appeal in the cause, he is estopped from claiming, after the time for appeal has elapsed, that the appeal must be dismissed because of the failure of the undertaking to refer to the appeal from the new-trial order. — *Form v. Yoell*, 442.
11. REVIEW OF CONFLICTING EVIDENCE — DEPOSITIONS — ORAL EXAMINATION OF WITNESS. — The fact that upon the second trial of a cause a

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large part of the testimony taken at the first trial was read without recalling the witnesses, and two or three depositions were introduced, does not warrant the appellate court in drawing its own conclusions from conflicting evidence, and disregarding the conclusions reached by the trial judge, where two or three witnesses, including the plaintiff himself, whose former testimony was read, were re-examined, and many others were examined whose testimony was to a large extent important and material. — *Ross v. Butler*, 206.

12. REASONS OF RULE AS TO REVIEW OF EVIDENCE — APPELLATE JURISDICTION. — The rule that this court will not review the finding of a jury or of a court as to a fact decided upon the weight of evidence is not adopted merely because the court below has the opportunity to observe the appearance and bearing of the witnesses, but is founded in the essential distinction between the trial and appellate courts under our system, and grows out of consideration of jurisdiction, that it is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law, and that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show an abuse of discretion. — *Id.*

13. REVIEW OF WRITTEN EVIDENCE — CONFLICTING EVIDENCE. — The appellate court will look more closely into the evidence when it consists entirely of depositions, affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply. — *Id.*

14. REVIEW OF ORDER GRANTING NEW TRIAL — ERROR IN REFUSING NON-SUIT — INSUFFICIENCY OF EVIDENCE — DISCRETION. — Where the court grants a new trial to the defendant, upon the ground that it erred in denying two motions of the defendant for a nonsuit, one made when the plaintiff's case was rested, and the other made after all the evidence was closed, and before the submission of the case to the jury, the new trial is practically granted for insufficiency of the evidence to justify the verdict for the plaintiff, and the order granting it will not be reversed upon appeal, if no abuse of discretion appears. — *Fos v. Southern Pacific Company*, 284.

15. PRESUMPTION — JUDGMENT ROLL — CERTIFICATE OF CLERK. — Upon an appeal from a judgment, it will be presumed, in the absence of a showing to the contrary, that the pleadings, order overruling the demurrer, minutes of the court, findings, and judgment, contained in the transcript, and mentioned in the certificate of the clerk attached thereto as being correct, constitute the judgment roll; and it is not necessary that the certificate should also state that they constitute the judgment roll. — *O'Shea v. Wilkinson*, 454.

16. REVIEW OF DEMURRER — ERRORS AGAINST RESPONDENT. — Where a demurrer of a defendant is overruled for want of presentation, upon an appeal by the plaintiff from a judgment for the defendant, the respondent cannot urge any grounds of special demurrer, or any errors committed against him, for the purpose of sustaining a judgment erroneously rendered in his favor after a trial upon the merits; but the appellate court can only consider such errors of the court as contributed to the rendition

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- of the judgment for the defendant, and can consider the demurrer only so far as it goes generally to the cause of action, and affects the question whether the complaint is sufficient to render the exclusion of evidence under it erroneous. — *Bates v. Babcock*, 479.
17. **DISMISSAL — FRIVOLOUSNESS.** — An appeal will not be dismissed upon motion therefor, upon the ground that it is frivolous. To dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit. — *People v. McNulty*, 594.
18. **APPEAL IN CRIMINAL CASE — GROUNDS OF DISMISSAL.** — Under section 1248 of the Penal Code, the supreme court is forbidden to dismiss an appeal in a criminal case, unless the appeal itself is irregular in some substantial particular, to be determined by reference to the order or judgment appealed from, and the steps taken to perfect the appeal. — *Id.*
19. **APPEALABLE ORDER — CRIMINAL LAW — HOMICIDE — ORDER FIXING TIME AND PLACE FOR EXECUTION.** — An order made after the affirmation of a capital conviction, fixing the time and place of execution, is an appealable order, and an appeal therefrom cannot be considered upon its merits upon a motion to dismiss, or be dismissed upon the ground that it is frivolous. — *Id.*
20. **STAY OF EXECUTION — CERTIFICATE OF PROBABLE CAUSE.** — An appeal from such order does not *ipso facto* stay the execution of the sentence; but in order to effect such a stay, a certificate of probable cause for the appeal must be obtained from either a judge of the trial court or of the appellate court. — *Id.*
21. **BILL OF EXCEPTIONS — AMENDMENT.** — Where an appeal is taken from a decision made before the settlement of a bill of exceptions, the allowing of an amendment to the bill, by the insertion of specifications of the particulars in which it is claimed that the findings and decree of the court are not sustained by the evidence, is proper, as the effect of the amendment is simply to enable the appellate court to review the decision of the trial court, in view of all the facts which the trial court had before it when it made such decision. — *Estate of Lamb*, 397.
22. **SERVICE OF NOTICE — OBJECTION TO JURISDICTION — WAIVER UNDER RULES.** — An objection by a respondent to the jurisdiction of the supreme court to entertain the appeal, on the ground that it does not appear that the notice of appeal was served, will not be considered by the court, where the objection was not taken and notified to the appellant in writing ten days before the hearing, as provided for by the rules of the supreme court. — *Pedrorena v. Hotchkiss*, 636.
23. **AFFIDAVIT OF INCURABLE DEFECT IN TRANSCRIPT.** — The consequence of failing to give such notice as provided by the rules cannot be avoided by the making of an affidavit by the respondent to the effect that the defect cannot be cured by a suggestion of diminution of the record, under the rules. — *Id.*
24. **JUDGMENT ROLL — ORDERS NOT INCORPORATED IN BILL OF EXCEPTIONS — SETTING ASIDE DEFAULT — STRIKING OUT ANSWER.** — An order setting aside a default upon conditions, and an order striking out an answer for failure to comply with the conditions, do not constitute part of the judgment roll, and cannot be considered as part of the record upon

APPEAL (Continued).

appeal from the judgment, though printed in the transcript, if not incorporated in a bill of exceptions, and no points attempted to be made in regard to them can be noticed upon such appeal. — *Id.*

SEE CORPORATIONS, 22-25; DIVORCE, 11, 12; FINDINGS, 1, 2; INSTRUCTIONS; MECHANIC'S LIEN, 8; MORTGAGE; NEW TRIAL, 1, 7, 9; PLEADING, 18.

APPROPRIATION. See WATER AND WATER RIGHTS, 8, 5, 19.

ARBITRATION.

1. **MORTGAGE — CONDITION AS TO APPROVAL OF TITLE BY ATTORNEYS — VALIDITY OF TITLE IMMATERIAL IN ABSENCE OF FRAUD.** — In an action to foreclose a mortgage given to secure the payment of promissory notes, payable to the mortgagee when he should perfect the title to certain land to the satisfaction of certain attorneys named, where it appears that the attorneys named rejected the title, and there is no allegation that their action was controlled by fraud, collusion, or undue influence, the mortgagee cannot recover, although the court may find the title to be in fact good. — *Church v. Shanklin*, 628.
2. **PERFORMANCE OF CONTRACT. — DECISION OF UMPIRE. — JURISDICTION OF COURT.** — When parties to a contract fix upon an umpire and agree to abide by his decision, neither of them, without the consent of the other, can, in the absence of fraud, withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a court or jury. — *Id.*

ASSAULT. See CRIMINAL LAW, 5-8.

ASSESSMENT. See RECLAMATION DISTRICT; STREETS, ROADS, AND HIGHWAYS, 12.

ATTACHMENT.

1. **UNDERTAKING FOR RELEASE — RETURN OF EXECUTION — CONDITION PRECEDENT TO ACTION.** — Under section 552 of the Code of Civil Procedure, providing that if an execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to sections 554 and 555 of the same code, for the release of property attached, the issuance and return of an execution is a condition precedent to the right to commence an action upon the undertaking. — *Brownlee v. Riffenburg*, 447.
2. **DEMAND FOR RETURN OF PROPERTY.** — An undertaking for the release of property taken under a writ of attachment in an action, conditioned that the "defendant will, on demand, redeliver such attached property so released to the proper officer," does not limit the right to make the demand to the officer to whom the property is to be delivered, but the party in whose behalf the demand is to be made may himself make it, and it is only necessary that the officer be clothed with authority to receive the property and sell it. — *Id.*

See JUDGMENT, 9, 10; PLEADING, 18; STATUTE OF FRAUDS, 2.

ATTORNEY AND CLIENT. See **CONTRACTS**, 11, 12; **DIVORCE**, 15.

BILL OF EXCEPTIONS. See **APPEAL**.

BONA FIDE PURCHASER.

1. **VENDOR'S LIEN — NOTICE BEFORE PAYMENT.** — In an action to foreclose a vendor's lien upon land, a defense of a second vendee, that he was a *bona fide* purchaser for value without notice, is not made out by proof that he purchased in good faith, without any previous knowledge of the fact that his vendor had not fully paid the original vendor, but it is also necessary for him to show that he had paid for the land before he received notice of the original vendor's lien. — *Combination Land Co. v. Morgan*, 548.

2. **NOTICE OF NON-PAYMENT BY VENDOR — EFFECT UPON SECOND VENDEE — DEDUCTION FROM PURCHASE PRICE.** — Notice to a second vendee of land before his payment for the land, that his vendor had not fully paid the original vendor, is equivalent to a notice before purchase, and he is affected *pro tanto* as to the amount remaining unpaid by his vendor, and if he pays such amount he can enforce repayment from his vendor by deducting it from the purchase price or valuation of the land sold to him. — *Id.*

BOUNDARY. See **DEEDS**, 8, 9; **EJECTMENT**; **MUNICIPAL CORPORATIONS**; **PLEADING**, 17; **STREETS, ROADS, AND HIGHWAYS**, 12.

BUILDING CONTRACT. See **CONTRACTS**, 6-10.

CLAIM AND DELIVERY. See **INSTRUCTIONS**.

COLOR OF TITLE. See **EJECTMENT**, 4.

COMMUNITY PROPERTY.

1. **HUSBAND AND WIFE — PURCHASE AFTER MARRIAGE — PRESUMPTION — BURDEN OF PROOF.** — Real estate acquired by purchase during coverture is presumed to be community property, no matter whether the deed be taken in the name of the husband or wife, or both. While this presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence. — *Dimmick v. Dimmick*, 323.

2. **SEPARATE PROPERTY — NECESSITY OF IDENTIFICATION — COMMINGLING OF FUNDS.** — In order that property may maintain its status as separate property, it is not necessary that it should be preserved in specie or in kind; yet when it has undergone mutations and assumed other conditions, it is absolutely necessary, in order to maintain its character as separate property, that it be clearly traced and located; and where money belonging to the wife has been so commingled with the funds of her husband, who is an active business man engaged in numerous speculations, so that it is impossible to say that any part of it passed into a particular tract of land purchased by the husband, such tract is community property. — *Id.*

3. **HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — GIFT BY HUSBAND FROM COMMUNITY PROPERTY — COMMINGLING OF PROPERTY.** — Property

COMMUNITY PROPERTY (Continued).

acquired after marriage may, as between husband and wife, become the separate property to the latter by gift; and community property may be allowed by the husband to be so mingled with the profits of the wife's separate estate as to indicate an intention that it should be her separate property. — *Diefendorff v. Hopkins*, 343.

4. BOARDING-HOUSES KEPT BY WIFE — TITLE TO FURNITURE. — Where a married woman has carried on boarding-houses with her separate funds mingled with a monthly allowance from her husband for the support of herself and children, and the whole course of conduct of both husband and wife for years, and all their declarations, show that she managed the boarding-houses, and bought and sold and exchanged furniture as she pleased, and in her own name, with her husband's knowledge and tacit consent, the husband repudiating any concern in the business, or any responsibility for its debts, and advising the wife to give it up, the circumstances are sufficient to overcome the presumption that the furniture so purchased is community property, and to establish the title of the wife to it as her separate property, which may be seized for her debts. — *Id.*

See DEEDS, 13; HOMESTEAD, 1.

COMPROMISE. See CONTRACTS, 16.

CONSIDERATION.

1. ELECTRIC STREET-RAILROAD — VOID FRANCHISE — PLEADING — PROMISE TO PAY FOR STREET PAVING — WANT OF CONSIDERATION. — A complaint in an action upon a written obligation for the payment of money, which alleges that the obligation was given by the defendant, an electric street-railroad company, to repay the plaintiff and other property owners for paving the street, in consideration that the plaintiff would not take any steps to prevent the electric company from tearing up the paving and laying its tracks; and which also alleges facts showing that the franchise of the company is void, having been granted by the city council without power, and that the plaintiff and other property owners could and would have prevented the defendant from laying its tracks on the street but for the promise to pay,—shows a want of consideration for the promise, and states no cause of action.—*Amestoy v. Electric Rapid Transit Co.*, 311.
2. ASSIGNMENT OF VOID FRANCHISE — VOID ORDINANCE — CONDITION THAT PROPERTY OWNERS BE REPAYED. — An assignment of a void franchise confers no rights, and a void ordinance granting a franchise to the assignee, on condition that the grantee repay to property owners all sums paid by them for paving, which the assignor had been required to do under a former void ordinance, cannot constitute a consideration for a promise to pay the money to the property owners. — *Id.*
3. OBSTRUCTION OF STREET — PUBLIC NUISANCE — SPECIAL DAMAGE — CONTRACT AGAINST PUBLIC POLICY. — A track laid and poles erected in the street without authority constitute an illegal obstruction, or public nuisance; and where no fact is averred to show special damage to the plaintiff by the obstruction, an agreement not to prevent it is an agreement not to institute a public prosecution, which is against public policy

CONSIDERATION (Continued).

and void, and cannot constitute a consideration for a promise to pay money for not preventing it. — *Id.*

4. **TAKING UP OF GRANITE BLOCKS — CONSIDERATION OF PROMISE TO PAY FOR PAVING.** — The taking up of granite blocks used in paving the street, and which apparently belong to the city, constitutes no consideration for a promise to pay a property owner for the paving done by him, it not appearing that they were sold to the defendant by the plaintiff, or that the plaintiff consented to their removal in consideration of such promise. — *Id.*

See *DEEDS*, 11, 12; *EVIDENCE*, 10; *TRUST*, 2.

CONSTABLES. See *COUNTY GOVERNMENT ACT*.

CONSTITUTIONAL LAW. See *COUNTY GOVERNMENT ACT*; *EMINENT DOMAIN*, 1; *EXECUTION*, 1; *SUPREME COURT*; *WATER AND WATER RIGHTS*, 1.

CONTEMPT.

REFUSAL TO OBEY ORDER. — The refusal of the husband to pay money for the support of a minor child, which the court, in an action for divorce, has ordered to be paid to its grandmother, to whom the custody of the child was awarded, is a contempt of court, punishable by imprisonment until the money is paid, if the husband is found to have the ability to do so. — *Ex parte Gordon*, 374.

CONTINUANCE. See *PRACTICE*, 2, 3.

CONTRACT.

1. **ENTIRE CONTRACT — PREVENTION OF PERFORMANCE — QUANTUM MERUIT** — Where work has been done under an entire contract, which the defendant, without justifiable cause, prevented the plaintiff from completing, the defendant is liable to the plaintiff for the value of the labor done and materials furnished and used. — *Joyce v. White*, 236.
2. **CONTRACT OF STREET-RAILWAY COMPANY TO RUN TRAINS — FORFEITURE OF EXTENSION — EXCUSE FOR NON-PERFORMANCE — FORECLOSURE OF MORTGAGE — RECEIVER — INJUNCTION.** — The performance by a street-railway company of its contract to run regular trains each day for a period of ten years, under penalty of forfeiting an extension of its road, to be conveyed upon demand, is not excused because of the bringing of a suit by a mortgagee to foreclose a mortgage upon the street-railway, and the appointment of a receiver to take possession thereof, who failed and ceased to operate the road, the street-railway company being enjoined from interfering with the possession and control of the road. — *Klaeber v. San Diego Street-car Co.*, 353.
3. **PERFORMANCE OF CONTRACT — INTERFERENCE BY WRIT — SUIT BY PRIVATE LITIGANT — PREVENTION BY OPERATION OF LAW.** — The interference by a writ sued out by a private litigant will not excuse the performance of a contract, although it may deprive the contracting party of the means of performance; and such interference is not a prevention by operation of law. — *Id.*

CONTRACT (Continued).

4. **CONTROL OF ACTS OF THIRD PARTIES.**—The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract. — *Id.*
5. **IMPOSSIBILITY OF PERFORMANCE.**—The impossibility of performance which will excuse the performance of a contract by the parties thereto must consist in the nature of the thing to be done, and not in the inability of the parties to do it. If the thing can be accomplished by any one with proper means and the requisite skill and knowledge, the promisor is not less answerable because it is impossible to him. — *Id.*
6. **UNRECORDED BUILDING CONTRACT—ACTION FOR REASONABLE VALUE OF WORK AND MATERIALS.**—An action may be maintained for the reasonable value of work done and materials furnished in the erection of a building, although the value of the labor and materials exceeds one thousand dollars; and it is no defense to such an action, either that the implied contract for reasonable value was not recorded, or that the work and materials were done and furnished in pursuance of a written contract which was not filed for record in accordance with the statute. — *Rebman v. San Gabriel Valley Land and Water Co.*, 390.
7. **RECORD OF IMPLIED CONTRACT—CONSTRUCTION OF CODE.**—The code does not provide for recording an implied contract which is not complete until the labor is done and materials furnished, and could not be recorded before the commencement of the work. The statute only applies to express contracts stating obligations thereafter to be performed. — *Id.*
8. **INVALIDITY OF UNRECORDED WRITTEN CONTRACT—EVIDENCE OF REASONABLE VALUE.**—A written contract for the erection of a building for a price exceeding one thousand dollars, if not recorded, is wholly void for all purposes, and is not competent evidence of the value of the labor done and materials furnished in the erection of the building, in an action to recover their reasonable value. — *Id.*
9. **FINDINGS—WORK AND LABOR UNDER INVALID CONTRACT.**—In an action for the reasonable value of labor done and materials furnished in the erection of a building, where the defendant alleges that the work done and materials furnished were in pursuance of a written contract, a finding by the court that the alleged contract never had been recorded, and was therefore wholly void, is equivalent to a finding that there was no written contract, and that no labor was done or materials furnished under it; and it is immaterial whether the work and materials were or were not in accordance with the terms of the unrecorded written contract. — *Id.*
10. **COUNTERCLAIM FOR DAMAGES FOR BREACH OF INVALID CONTRACT—FINDINGS.**—In such action, where the answer pleaded damages as a counterclaim, because of the failure of the plaintiff to complete the building on the date stipulated in the written contract, and a cross-complaint filed by the defendant also claimed damages for such delinquency, a finding by the court that the written contract relied upon by the defendant, upon the breach of which such damages depended, was void for want of filing in the recorder's office, disposes of the issues thus raised. — *Id.*

CONTRACT (Continued).

11. **ATTORNEY AND CLIENT — SPECIAL CONTRACT FOR SERVICES OF ASSISTANT COUNSEL — SERVICE NOT REQUESTED — WAIVER OF PERFORMANCE.** — Where a firm of attorneys was employed to assist in the prosecution of certain libel suits pending and to be brought against a private individual, and also a civil suit against a newspaper for libelous articles, under a contract that part of the fee was to be paid in cash, a part in sixty days, and the balance "on the termination of said suits," and it appears that all the services were performed except the contemplated suit against the newspaper, and the evidence in an action upon the contract tends to show that the defendant never went near the members of the firm after employing them, nor in any manner thereafter requested them to bring the action against the newspaper, nor did the other attorneys whom they were employed to assist ever call upon them for any service in relation to such suit, it was not incumbent upon such firm to commence the action against the newspaper without further directions from the defendant or from the other attorneys, and having waited a reasonable length of time, and until after the action against the newspaper was barred by limitation, without receiving such directions, they were justified in assuming that the defendant had waived the bringing of the action, and they are entitled to recover the balance due under the contract, as if such service had been actually performed. — *Carter v. Baldwin*, 475.
12. **PLEADING — ALLEGATION OF FULL PERFORMANCE — PROOF OF WAIVER — IMMATERIAL VARIANCE.** — Where the complaint in such case alleged the full performance of the contract on the part of the attorneys, and the evidence upon the part of the plaintiff tended to show performance by them of all the services contemplated by the contract, except in relation to the suit against the newspaper, but as to that a waiver of performance by the defendant, and the evidence was received without objection, and the defendant is not shown to have been misled by the variance, it is to be disregarded as immaterial. — *Id.*
13. **EXCAVATION BY COTERMINOUS OWNER OF LAND — FALL OF ADJOINING BUILDING — BREACH OF AGREEMENT TO PAY DAMAGES — PLEADING — DEMURRER.** — A complaint alleging that the defendant commenced to excavate upon a lot adjoining premises occupied by plaintiff's assignors as a warehouse; that upon a notification that the excavation, if continued, would undermine the warehouse and damage the goods of the occupants, the defendant promised to stop the work of excavating and discontinue the same, but notwithstanding his promise, continued to excavate in a negligent, unskillful, and careless manner, and carried away the earth from under the warehouse, causing the floor of the warehouse to fall through, together with the goods stored therein, whereby the goods were greatly damaged; that thereupon a settlement of the damages was demanded, which the defendant promised to pay as soon as the damages should be fully ascertained; that afterwards a compromise was agreed upon, whereby the defendant was to take certain tin plate at a stipulated price, and was to take away certain rivets, sort them over, and return the undamaged ones, and to pay all damage for the rivets not returned; that the tin plate and rivets had been delivered to the defendant previous to the agreement, but that some of the rivets

CONTRACT (Continued).

which were to be sorted and returned were so unskillfully sorted that the firm refused to receive them, and that the residue had never been sorted or returned, and that the firm were damaged thereby in a certain sum, but that the defendant had failed to pay any part of the damages, — states a cause of action for the breach of the agreement to pay for the goods delivered and the damages caused by the excavation, and is not demurrable, upon the ground of uncertainty, or that several causes of action are improperly united. — *Dunston v. Niles*, 494.

14. **MATTER OF INDUCEMENT — UNCERTAINTY OF PLEADING.** — The action is for breach of the oral agreement to pay what damages were agreed for excavating and removing the earth from under the warehouse and causing it to fall, and not merely for excavating upon the adjoining lot, and the previous recitals are of matter of inducement, and do not render the complaint uncertain. — *Id.*

15. **AGREEMENT OF COMPROMISE — DISTINCT ITEMS — JOINDER OF CAUSES.** — The fact that the agreement of compromise specifies several distinct items or payments to be made does not make them different causes of action, nor render the complaint demurrable for misjoinder of causes. — *Id.*

16. **CONTRACT TO PAY DAMAGE — CONSIDERATION.** — It is a sufficient consideration for the promise of the defendant to pay to the tenants of the warehouse the damage caused by the excavation that the owner of the warehouse authorized the defendant to erect a wall on the line for a party-wall, and that it was necessary for the defendant to dig under the warehouse and remove one of its walls, thereby causing the damage agreed to be paid. — *Id.*

See **ARBITRATION; CONSIDERATION; EVIDENCE, 8-18; GROWING CROPS.**

CONVERSION. See **FINDINGS, 5.**

CORPORATIONS.

1. **SUBSCRIPTIONS TO STOCK — CREDITOR'S BILL — PLEADING — INDEBTEDNESS OF CORPORATION — CONCLUSIVENESS OF JUDGMENT.** — A judgment against a corporation establishes its liability conclusively until reversed in a direct proceeding, and concludes the stockholders in an action against them in the nature of a creditor's bill, to compel them to pay in the unpaid portion of their subscriptions to the capital stock, toward the satisfaction of the judgment obtained; and it is not necessary that the complaint in such action should allege the indebtedness upon which the judgment was recovered. — *Tatum v. Rosenthal*, 129.

2. **INSOLVENCY OF CORPORATION — SUFFICIENCY OF COMPLAINT — NON-JOINDER OF CREDITORS — GENERAL DEMURRER — ANSWER.** — A complaint in an action in the nature of a creditor's bill to compel the subscribers to the capital stock of an insolvent corporation to account for and pay in the unpaid portion of their subscriptions to the satisfaction of a judgment obtained against the corporation, which alleges the existence of the judgment debt, the insolvency of the corporation, that the subscribers owe on their unpaid subscriptions, and that the execution issuing on the judgment has been returned wholly unsatisfied, but which does not show upon its face that there are any other creditors of

CORPORATIONS (Continued).

the corporation, states a cause of action, although it does not state that the proceedings are for the benefit of all the creditors; and the question of defect in the pleading, or of non-joinder of other creditors, cannot be raised upon general demurrer to such complaint, but can only be pleaded by answer. — *Id.*

3. **RIGHT OF JUDGMENT CREDITOR.** — A judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may, alone or with other judgment creditors, file a bill against persons holding property of the debtor which cannot be reached by execution. — *Id.*
4. **DIVISION OF FUND — ACTION BY SINGLE CREDITOR — DECREE FOR BENEFIT OF ALL.** — Where a fund can only be divided satisfactorily among a certain class of persons, the decree must be so framed that all of them may be brought in for their distributive shares, but even then the bill may often be filed by any one of them on his own behalf. It is only when it subsequently appears to the court that a distribution must be made that a decree will be made for the benefit of all. — *Id.*
5. **UNPAID SUBSCRIPTIONS TO STOCK — CREDITOR'S BILL TO ENFORCE PAYMENT.** — A judgment creditor who has exhausted his legal remedies against a corporation may maintain a creditor's bill against one or more stockholders to recover the amount due to the corporation upon unpaid subscriptions to its stock. — *Potter v. Dear*, 578.
6. **PARTIES TO CREDITOR'S BILL — NON-JOINDER OF CORPORATION — PLEADING — WAIVER OF OBJECTION.** — The corporation should be made a party to a creditor's bill against subscribing stockholders, but is not an indispensable party, unless the object of the action is to secure an adjudication of the rights and liabilities of all the parties, and a final settlement of all the affairs of the company; and when the action is against a single stockholder, objection to the non-joinder of the corporation is waived, if not made by demurrer or answer. — *Id.*
7. **JURISDICTION OF EQUITY — LEGAL REMEDY AGAINST STOCKHOLDERS — INSOLVENCY OF STOCKHOLDERS NOT JOINED.** — A court of equity will entertain jurisdiction over an action by a judgment creditor who has exhausted his legal remedies against the corporation to compel payment of unpaid subscriptions to its stock, without regard to the exhaustion of any concurrent legal remedy against the stockholders upon their individual liability, and without regard to the insolvency of subscribing stockholders having a subscribed capital stock. — *Id.*
8. **LAND AND IMPROVEMENT COMPANY — SUBSCRIBED CAPITAL STOCK.** — A land and improvement company, organized for the purpose of acquiring real property, by purchase or otherwise, buying and selling the same, building hotels, street-railroads, and otherwise developing lands, stands upon the same basis as banking, railroad, insurance, and like commercial corporations having a subscribed capital stock. — *Id.*
9. **UNPAID SUBSCRIPTIONS TO STOCK — CREDITOR'S BILL TO ENFORCE PAYMENT.** — A judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all the creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. — *Boines v. Babcock*, 581.

CORPORATIONS (Continued).

10. **STOCKHOLDER'S PERSONAL LIABILITY TO CREDITORS — CONSTRUCTION OF CODE.** — The remedy given by section 822 of the Civil Code, fixing the personal liability of the stockholders of a corporation, is purely statutory, and furnishes to creditors of corporations additional security, by making the stockholders directly liable for their proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment. — *Id.*
11. **SEVERAL LIABILITY OF STOCKHOLDERS UPON SUBSCRIPTIONS — PARTIES TO CREDITOR'S BILL.** — The liability of each stockholder upon his subscription to the capital stock of a corporation is several, and not joint, and upon a creditor's bill by a judgment creditor who has exhausted his legal remedies against the corporation, to subject the amount due from the stockholders for unpaid subscriptions for stock to the payment of the judgment, it is not necessary that all of the stockholders should be made parties defendant. — *Id.*
12. **EVIDENCE — PURSUIT OF STATUTORY LIABILITY — EXHAUSTION OF REMEDIES — RETURN OF EXECUTION UNSATISFIED.** — It is not necessary for the judgment creditor of the corporation, who is seeking in equity to enforce payment of subscriptions to stock, to show that he had pursued his statutory remedy against the stockholders, and proof that the creditor had exhausted his legal remedies against the corporation is shown by the introduction in evidence of the judgment against the corporation with the return of the execution issued thereon unsatisfied. — *Id.*
13. **CONCLUSIVENESS OF RETURNS — INADMISSIBLE EVIDENCE — PROPERTY SUBJECT TO EXECUTION.** — The return of the execution issued upon the judgment as unsatisfied is conclusive, in the equitable action against the stockholders, that the creditor has exhausted his legal remedy upon the judgment; and evidence offered by the defendants for the purpose of showing that the corporation was the owner and in possession of a large amount of personal property, which might have been levied upon, is properly rejected by the trial court. — *Id.*
14. **CONCLUSIVENESS OF JUDGMENT — INADMISSIBLE ASSAULT BY STOCKHOLDERS — DEBT OF CORPORATION ULTRA VIRES.** — A judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of the creditor to subject its property to the satisfaction thereof; and in the absence of fraud is equally conclusive upon the stockholder, when it is sought to satisfy the judgment out of the assets of the corporation in his hands; and evidence offered by the stockholders in the action against them, to show that the indebtedness for which the judgment against the corporation was recovered arose upon a contract which was *ultra vires*, is properly excluded by the trial court. — *Id.*
15. **ACTS OF CORPORATION BINDING UPON STOCKHOLDERS IN ABSENCE OF FRAUD.** — A corporation represents and binds its stockholders in all matters within the limits of its corporate powers, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corpo-

CORPORATIONS (Continued).

ration, it binds the stockholders as fully as in the making of contracts; and with its right to maintain and defend actions concerning its corporate rights or liabilities, the stockholders cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action. — *Id.*

16. STOCK IN NAME OF DEFENDANT — LIABILITY OF HOLDER TO CREDITORS — INADMISSIBLE EVIDENCE — AGENCY FOR OWNERS. — One to whom stock is issued by a corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner, although he was in fact a pledgee, agent, or trustee for the real owner; and in an action against a stockholder to subject the amount due from him for unpaid subscriptions to stock to the payment of an unsatisfied judgment against the corporation, evidence is inadmissible to show that he was the real owner of only part of the shares issued to him by the corporation, and that the others standing in his name were owned by other parties, and were issued to him for the purpose of negotiating a loan for the real owners. — *Id.*
17. SUBSCRIPTION TO STOCK — STATEMENTS CONCERNING FUTURE EVENT — MATTERS OF OPINION. — Statements concerning the happening of a future event, being necessarily matters of opinion merely, cannot be relied upon to avoid subscriptions obtained by an agent of a corporation for shares of its capital stock. — *Jefferson v. Hewitt*, 535.
18. SUBSCRIPTION FOR RAILROAD SHARES — INCORRECT STATEMENTS AS TO TIME OF COMPLETION OF ROAD — DEFENSE TO NOTE. — Statements made by an agent obtaining subscriptions for shares in a railroad company, to the effect that the railroad would be completed within a certain time and would be built upon a certain route, do not render a subscription made upon the faith of them voidable, or constitute a defense to a note given for such subscription, although the road be not built upon the route or within the time indicated. — *Id.*
19. CONDITIONAL SUBSCRIPTION. — In order that delay in completion of the road may be available as a defense to a promissory note given upon a subscription for shares, the time of completion must be shown to have been a condition agreed upon by the parties as a term of the subscription. — *Id.*
20. FRAUDULENT CONVEYANCE — ACTION BY CREDITOR — NECESSITY OF JUDGMENT — EXCEPTIONS TO RULE — TRANSFER OF PROPERTY OF INSOLVENT CORPORATION. — Though, as a general rule, a creditor must have first recovered judgment against his debtor and have execution returned unsatisfied before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor, yet this rule has exceptions, and does not apply to a case of a transfer of all the property of an insolvent corporation, without consideration, to a new corporation, through the fraud of the managing agent of the insolvent corporation, as part of a scheme to cheat and defraud the creditors and other stockholders of the insolvent corporation. — *Blanco v. Paymaster Mining Co.*, 524.
21. NEW CORPORATION CONTINUATION OF OLD — LIABILITY FOR INDEBTEDNESS WITHOUT JUDGMENT. — In such case the new corporation will be
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CORPORATIONS (Continued).

regarded in a court of equity as a continuation of the former one, and will be held liable for the indebtedness of such former one to the extent of the value of the property received without consideration from it, although there has been no valid judgment against the former corporation for the amount of the claim, and therefore no return of execution unsatisfied. — *Id.*

22. **UNDERTAKING ON APPEAL — EXECUTION BY FOREIGN SURETY CORPORATION — AUTHORITY OF OFFICERS.** — An undertaking upon appeal, executed by a foreign surety corporation, and signed in behalf of the corporation surety by its second vice-president and its assistant secretary, with the seal of the corporation affixed, will not be declared void, as not being properly signed, where there is nothing to show that such officers were not authorized to sign and deliver it. — *Gutsell v. Penate*, 598.
23. **AUTHORITY OF FOREIGN CORPORATION TO TRANSACT BUSINESS — CERTIFICATE OF INSURANCE COMMISSIONER — DISMISSAL OF APPEAL.** — A motion to dismiss an appeal upon the ground that the undertaking was executed by a foreign surety corporation which had not filed with the secretary of state a designation of some person residing in this state upon whom service of process could be made, as required by the act of April 1, 1872 (Stats. 1871-72, p. 826), will be denied, where it appears from the certificate of the insurance commissioner of this state that the surety corporation is duly authorized to transact business in this state. — *Id.*
24. **EFFECT OF CERTIFICATE — PRESUMPTION.** — There is a presumption that the insurance commissioner properly performed his official duty in issuing the certificate, and such certificate is *prima facie* evidence that the surety company has complied with section 616 of the Civil Code, though it does not expressly so state. — *Id.*
25. **CONSTRUCTION OF CODE — DESIGNATION OF AGENT OF FOREIGN SURETY CORPORATION — FILING IN OFFICE OF INSURANCE COMMISSIONER — STATUTE OF LIMITATIONS.** — Section 1056 of the Code of Civil Procedure, giving the insurance commissioner the same jurisdiction and powers to examine the affairs of a surety corporation as he has in other cases, and requiring him to file similar statements and issue similar certificates, and section 616 of the Political Code, providing that the commissioner is not authorized to issue such a certificate to a foreign insurance company until it has first filed in his office "the name of an agent and his place of residence in this state, on whom summons and other process may be served in all actions or other legal proceedings," apply to a foreign surety company; and when such a corporation has filed with the insurance commissioner the designation required by section 616, that is all that is required of it in the matter of naming an agent upon whom process may be served, to entitle it to do business in this state, although the failure to file such designation with the secretary of state might deprive it of the benefit of the statute of limitations, as provided by the second section of the act of April 1, 1872. — *Id.*

See MUNICIPAL CORPORATIONS; RECLAMATION DISTRICT; SUMMONS.

COSTS.

COST BILL — PREMATURE FILING — MOTION TO STRIKE OUT. — A cost bill filed before the filing of the findings and entry of judgment is filed be-

COSTS (Continued).

fore the time authorized by law, and should be stricken out upon motion.

— *Sellick v. De Carlow*, 644.

See **APPEAL**, 7.

COUNTERCLAIM. See **CONTRACTS**, 10.**COUNTY GOVERNMENT ACT.**

1. **COUNTIES OF TWENTY-SIXTH CLASS — FEES OF CONSTABLES — CONSTITUTIONAL LAW — COMPENSATION PROPORTIONED TO DUTIES.** — Section 188 of the County Government Act, as amended March 16, 1889, determining what fees shall be allowed to constables in counties of the twenty-sixth class, is not repugnant to section 5 of article II. of the constitution, providing that the compensation must be regulated "in proportion to duties." — *Green v. County of Fresno*, 329.
2. **MATTER OF FACT — PROVINCE OF LEGISLATION.** — What compensation of an officer should be deemed "in proportion to his duties" is a matter of fact to be ascertained and determined by the legislature, and not by the courts. — *Id.*
3. **REVIEW OF ACTION OF SUPERVISORS — AGREED STATEMENT OF FACTS — PRESUMPTION — EXCESS OF LIMIT.** — In a proceeding in the superior court of Fresno County to review the action of the board of supervisors of that county in rejecting portions of each claim presented for constable's fees, where the case was submitted upon an agreed statement of facts, which did not show upon what ground they were rejected, the superior court was authorized to presume that they were rejected upon any ground not negated by the statement, and that they were properly rejected because in excess of the fifteen-hundred-dollar limit fixed by section 188 of the County Government Act. — *Id.*
4. **CONSTITUTIONAL LAW — COMPENSATION OF CONSTABLES — DIMINUTION DURING TERM.** — An ordinance of the board of supervisors diminishing the compensation of constables for services in criminal cases during the term is not in conflict with section 9 of article XI. of the constitution, which prohibits an increase of salary of an officer after his election or during his term of office. — *People ex rel. Atkinson v. Johnson*, 471.
5. **SALARIES OF CONSTABLES — COMPENSATION NOT PROPORTIONED TO DUTIES.** — Subdivision 14 of section 188 of the act of March 13, 1891 (Stats. 1891, p. 377), entitled "An act to establish a uniform system of county and township governments," which attempts to delegate the power to fix the salaries of constables of counties of the twenty-first class to the board of supervisors, is in conflict with section 5 of article XI. of the constitution, which imposes upon the legislature the duty of regulating the compensation of such officers in proportion to duties, and is therefore void. — *Id.*
6. **MANDATORY PROVISION OF CONSTITUTION — DELEGATION OF LEGISLATIVE POWER.** — Section 5 of article XI. of the constitution, providing for the regulation by the legislature of the compensation of officers therein named in proportion to their duties, is mandatory, and the duty of such regulation cannot be delegated to the board of supervisors. — *Id.*

COURTS. See **SUPREME COURT**; **TAXATION**.

CREDITOR'S BILL. See CORPORATIONS, 1-7-9-16.

CRIMINAL LAW.

1. **TIME FOR FILING INFORMATION — RETURN OF DEPOSITIONS AND COMMITMENT — MOTION FOR DISCHARGE — DISCRETION.** — A motion in a criminal prosecution to discharge the defendant, because the information was not filed within thirty days after he was held to answer, may be denied in the discretion of the court, where it appears that at the time of the making of the motion the depositions and commitment thereon, upon which the information was based, had not been returned to the court by the committing magistrate. — *People v. Ah Sing*, 657.
2. **PERJURY — TESTIMONY UPON TRIAL — MATERIALITY TO THE ISSUE.** — In order to constitute the offense of perjury, alleged to have been committed in the giving of testimony upon a trial, it is not only necessary that the testimony should be false, but it must also appear that the testimony was material to the issue on trial. Testimony given as to matters collateral to the question at issue cannot furnish the foundation for a charge of perjury. — *Id.*
3. **ALLEGATION AND PROOF OF MATERIALITY.** — The materiality of the evidence in such a case is not only a necessary element of the information, but it is a fact which must be established by the evidence of the prosecution as fully and completely as any other fact in the case. — *Id.*
4. **PERJURY UPON EXAMINATION OF ANOTHER CHARGED WITH PERJURY — FALSE CHARGE OF LARCENY — IMMATERIAL TESTIMONY.** — Upon a prosecution for perjury, alleged to have been committed by the defendant at the preliminary examination before a justice of the peace, of another person also charged with perjury, where it appears that the complaint against the latter alleged that he committed perjury in swearing to a complaint falsely charging another person with petit larceny, but it does not appear what property was charged to have been stolen, and the only specification of perjury against the defendant is that he falsely testified that he saw the person charged with the larceny "take a bracelet" belonging to the person charged with perjury, it does not appear that such testimony was material upon the examination for perjury, and the evidence fails to support a judgment of conviction of the defendant. — *Id.*
5. **ASSAULT WITH INTENT TO MURDER — ABSENCE OF PERSON INTENDED TO BE KILLED.** — Where a policeman bored a hole in the roof of a building for the purpose of determining from observation whether or not the occupant was conducting therein a gambling or lottery game, and the occupant, having ascertained the fact, and believing that the policeman was on the roof at the point of contemplative observation, fired his pistol at that spot, with the intent to kill, he is guilty of an assault with intent to commit murder, although the officer was not at the spot when the shot was fired, but was upon another part of the roof. — *People v. Lee Kong*, 666.
6. **UNKNOWN OBSTRUCTIONS TO CRIMINAL ATTEMPT.** — Where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. — *Id.*

CRIMINAL LAW (Continued).

7. **ASSAULT — ATTEMPT COUPLED WITH ABILITY.** — In order to be guilty of an assault, there must be an unlawful attempt coupled with a present ability to accomplish the act intended. — *Id.*
8. **ABILITY TO ACCOMPLISH MURDER — LOADED PISTOL — MISTAKE AS TO LOCATION OF VICTIM.** — A person has the present ability to accomplish the murder intended, when he has a loaded pistol, and the person intended to be fired at is within reach of its effect, and the fact that he was mistaken as to the exact spot where his victim was located at the time of firing is immaterial. — *Id.*
9. **HOMICIDE — DRUNKENNESS — INSTRUCTION.** — Upon a prosecution for murder, an instruction to the jury that evidence of drunkenness can only be considered by them for the purpose of determining the degree of crime, and for such purpose it should be received with great caution, is correct. — *People v. Vincent*, 425.
10. **DEATH PENALTY — AMENDMENT OF CODE — PRIOR OFFENSES.** — The act of the legislature of March 31, 1891, amending sections 1217 and 1229 of the Penal Code, relating to the time and place for the execution of the death penalty of one convicted of murder in the first degree, does not apply to convictions for offenses committed prior to its enactment. — *Id.*
11. **LARCENY — EVIDENCE — IRRELEVANT STATEMENTS — CROSS-EXAMINATION — OBJECTIONS — MOTION TO STRIKE OUT.** — The fact that a witness, upon the trial of a defendant charged with the larceny of cattle, made irrelevant statements in his examination in chief as to the acts of the defendant with reference to other cattle does not give the defendant the right to enter into a cross-examination upon such matters. The remedy of the defendant is to object to the questions, if such were asked, and if the statements were volunteered, a motion to strike out should be made. — *People v. French*, 371.
12. **TIME NOT OF ESSENCE OF OFFENSE — ALIBI — INSTRUCTIONS.** — Where a defendant was charged with feloniously stealing and driving away cattle "on or about the twentieth day of November, 1890," and his defense was an *alibi*, an instruction to the jury to convict if they believed from the evidence, to a moral certainty, that the defendant stole, or aided in stealing, the cattle named in the information, although they might not believe that it was done on the 20th of November, 1890, but within a few days from that time, is proper, and does not deprive the defendant of the defense of *alibi*. — *Id.*
13. **LARCENY — FELONIOUS INTENT — INSUFFICIENCY OF EVIDENCE.** — To constitute the offense of larceny, there must be a felonious intent, and where there is an absence of proof of such intent, and the evidence tends to prove that the property taken was honestly believed to be the property of the defendant accused of larceny, the fact that he took and carried away the property of another does not justify a verdict of larceny. — *People v. Devine*, 227.
14. **APPROPRIATION OF LOST PROPERTY FOUND — CONSTRUCTION OF CODE — INSTRUCTION.** — Section 485 of the Penal Code, providing that one who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property, without trying to find the owner and restore the property to him, is guilty of larceny, relates in terms to property lost and found,

CRIMINAL LAW (Continued).

- and does not apply to a case where property comes into the possession of a party who does not know or suspect it to be the property of another; and an instruction based on that section, given in such a case, where there is no evidence of the finding of any lost property, is prejudicially erroneous. — *Id.*
15. **INAPPLICABLE INSTRUCTION — MISLEADING JURY — PREJUDICIAL ERROR.** — Although in some cases an inapplicable instruction which is correct as matter of law can do no harm, yet when it is liable to mislead a jury to the prejudice of one of the parties, it becomes as grave an error as though it were not correct as an abstract proposition of law. — *Id.*
16. **PREJUDICIAL CONDUCT OF DISTRICT ATTORNEY — ALLUSIONS TO OFFENSE NOT IN ISSUE — FELONIOUS INTENT.** — Statements, questions, and remarks by the district attorney, in the presence of the jury, in reference to incompetent proposed evidence of previous similar offenses of the defendant, not in issue, for the purpose of leading the jury to believe that the offense charged was committed with felonious intent, the contrary being claimed and testified to on behalf of the defendant, are calculated to prejudice the substantial rights of the defendant. — *Id.*
17. **ROBBERY — INFORMATION — POSSESSION BY PERSON ROBBED.** — An information charging a defendant with the taking of property by force from the person of the prosecutor, and against his will, and that the property was his personal property, sufficiently shows the possession of the property by him, and states facts sufficient to constitute the crime of robbery. — *People v. Ah Sing*, 654.
18. **PARTICULARITY OF AVERMENT — DEFECT OF FORM.** — Under the provisions of the Penal Code, the particularity of averment in an information necessary at common law is not required. It is only necessary that the substantial facts constituting the crime shall be alleged with sufficient certainty to enable the court to pronounce a proper judgment and the party to defend against the charge. Any defect of form not tending to the prejudice of a substantial right of the defendant must be disregarded. — *Id.*
19. **INSTRUCTION — FALSE TESTIMONY — RIGHT OF JURY TO DISREGARD WITNESS.** — An instruction in a criminal prosecution, to the effect that if the jury should believe that any witness had sworn falsely as to any fact in the case they were at liberty to entirely disregard the testimony of such witness, is not erroneous. — *Id.*
20. **THREATENING LETTER — INTENT TO EXTORT MONEY — INFORMATION — CONTENTS OF LETTER — ADAPTATION TO IMPLY THREAT.** — An information charging the defendant with sending a threatening letter with intent to extort money, which sets forth the letter, wherein defendant asked the person addressed to take some matter off from his hands which he had written for and in his behalf as the editor of a newspaper, and relieve him from further responsibility, and stating that he would go to press the next day, and which charges that the writing was adapted to imply threats, is sufficient to charge the offense. It is not necessary that a threat should be apparent from the face of the letter, nor that it should be implied therefrom; but it is sufficient that the language used is adapted to imply a threat. — *People v. Ohoyashii*, 640.

CRIMINAL LAW (Continued).**21. INSTRUCTION — WHAT THREAT LETTER MUST BE ADAPTED TO IMPLY.**

— An instruction to the jury, to the effect that it is not necessary to specify the offense imputed to the person to whom the letter is sent, but that if it does express or imply, or is adapted to imply, "any threat," the offense is committed, is too broad. The letter must be adapted to imply one or more of the threats mentioned in section 519 of the Penal Code, or the offense is not committed. — *Id.*

22. TRUTH OR FALSITY OF CHARGE IMMATERIAL. — In a criminal prosecution for the sending of a threatening letter with intent to extort money, the truth or falsity of the charge is immaterial, and it is not necessary to instruct the jury upon such matters. — *Id.***23. ELEMENTS OF OFFENSE.** — An instruction to the jury, to the effect that if the defendant is shown to be guilty of sending the letter, "with the motive imputed, he is guilty of this offense, and should be found guilty, no matter as to the consequences, whatever they may be," is erroneous. The court should have added that it was not only necessary for the accused to have sent the letter, and have had the intent to extort, but that the letter must have been such a writing as was adapted to imply a threat, in order to justify a conviction. — *Id.***24. ARGUMENTATIVE CHARGE — RESUME OF EVIDENCE — MATTERS OF FACT.**

— A charge to the jury should not be argumentative, or give a *resume* of the evidence, or encroach upon the right of the jury by passing upon matters of fact. The judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts. — *Id.*

See *APPEAL*, 18-20; *JURY AND JURORS*.

CROPPING CONTRACT. See *GROWING CROPS*.**DAMAGES.**

VERDICT — DAMAGES NOT EXCESSIVE. — A verdict for thirty thousand dollars damages held not excessive under the facts of this case. — *Smith v. Whittier*, 279.

See *CONTRACT*, 12, 16; *NEGLIGENCE*, 5-9, 11-14; *STATUTE OF LIMITATIONS*, 8, 9.

DEDICATION.

1. DEDICATION OF HIGHWAY — MANIFESTATION OF INTENT. — To constitute a dedication of land to public use as a highway, no particular formality of either word or act is required. It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate, or an acquiescence in the use of his land for a highway, or his declared assent to such use. The vital principle of the dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. — *Smith v. City of San Luis Obispo*, 463.

2. BUILDING FENCES — PUBLIC USE — DECLARATIONS OF INTENTION. — The act of a land-owner in building a fence on each side of a strip of

DEDICATION (Continued).

land, leaving it open at each end to the access of the public, the strip having been used for fifteen years prior thereto without objection, and traveled over by a large number of persons, the act of building such fence being both preceded and followed by expressed statements of the land-owner showing his intention to dedicate the land as a public street, shows such a dedication. — *Id.*

3. **PAYMENT OF TAXES — REBUTTAL OF INTENTION.** — Where the intention of a land-owner to dedicate part of the land for street purposes has been shown by specific acts, and it does not appear but that the entire tract, including the street, has been assessed as a whole, the payment of the tax thereon by the owner cannot be held to rebut his intention of dedication so shown by his specific acts. — *Id.*

4. **ASSESSMENT OF TAXES — ESTOPPEL OF PUBLIC.** — The general public are not estopped from claiming that land has been dedicated as a public street by the act or omission of the city assessor in assessing the land to the dedicator and his successors in interest. — *Id.*

5. **PUBLIC USE WITHOUT ACTION OF MUNICIPAL AUTHORITIES.** — The use of land as a street by the public, for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient to perfect the dedication, without any specific action by the municipal authorities either by resolution or by repairs or improvements. — *Id.*

6. **COMMON-LAW DEDICATION — ESTOPPEL OF DEDICATOR — RIGHTS OF PUBLIC.** — A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of a city. — *Id.*

7. **EVIDENCE OF DEDICATION.** — The evidence in this case reviewed and held to show an act of dedication of land to public use for street purposes. — *Id.*

See **STREETS, ROADS, AND HIGHWAYS, § 7, 15.**

DEEDS.

1. **DESCRIPTION OF TOWN LOTS — CERTAINTY — REFERENCE TO PLAT — PAROL EVIDENCE — IDENTITY OF PLAT.** — A deed of town lots which gives the dimensions of the boundaries thereof, and describes them by the numbers of the lots and block, referring to a plat thereof, is not upon its face void for uncertainty, though the description is not sufficiently certain without production, by one claiming under it, of the plat therein referred to, or of its contents; and parol evidence is admissible for the purpose of identifying a plat offered in evidence as the one referred to in the deed. — *Redd v. Murry*, 48.

2. **QUIETING TITLE — EVIDENCE — EXISTENCE OF MAP — PROOF OF IDENTITY — REFERENCES IN CHAIN OF TITLE — CONVEYANCES FROM DEFENDANT — ADMISSION.** — In an action to quiet title to land where the deed under which the plaintiff claims title was made by one of the defendants, and refers to a map for a description of the property, such deed is, as against that defendant and his co-defendant claiming under him by a subsequent conveyance, sufficient proof of the fact that there was such a plat in existence at the date of the deed to the plaintiff; and further evidence, tending to show that the property was in fact surveyed prior to the execution of any of such deeds, and that the defendant who

DEEDS (Continued).

was the grantor of the plaintiff had himself, some ten years thereafter, produced the map offered in evidence as the plat of the tract, sufficiently identifies the map as the one mentioned in the deed, and entitles it to be admitted in evidence on behalf of the plaintiff. — *Id.*

3. **MAP OF ADDITION TO TOWN — CERTAINTY — ABSENCE OF FIELD-NOTES OR DESIGNATION — REFERENCE TO NATURAL MONUMENTS — LOCATION OF LAND.** — Where a map of an addition to a town, though unaccompanied by field-notes, and having no signs or letters to indicate the different points of the compass, or any express designation of it as the map of any particular place, yet shows upon its face streets and alleys, and blocks subdivided into lots, and the relative location of a country road and a river, naming many of the streets and numbering the blocks, it cannot be said, as a matter of law, that the map is upon its face void for uncertainty, or that it would be impossible to locate upon the ground a block of land, described in a deed by number, and as bounded on one side by one of the streets named in the map. — *Id.*
4. **IDENTITY OF BLOCK — EVIDENCE.** — Whether a block of land referred to in a deed is capable of being identified by reference to a map of an addition to the town is a question of fact, upon which the evidence of persons acquainted with the town, and what is known as such addition thereto, and the different streets or other objects shown on the map, is admissible. — *Id.*
5. **METES AND BOUNDS OF BLOCK — FINDING AGAINST EVIDENCE.** — Where the plaintiff claims under a deed of town lots, which does not describe the lots by metes and bounds, but refers to them only as constituting a block designated on the map of an addition to the town, and though introducing and identifying the map, introduces no evidence showing that the land could be properly located and described by specific metes and bounds with the aid of the map, a finding and judgment that the plaintiff is the owner of land described by specific metes and bounds is against the evidence. — *Id.*
6. **EFFECT OF OVERRULED DECISIONS — DEED PASSING TITLE.** — The decisions of the supreme court of this state do not make or change the law, but simply declare what the law is, and overruled decisions declaring that a conveyance absolute in form but intended merely as security did not pass the legal title to the grantee, not having stated the law correctly as declared in later cases, cannot be considered as forming part of a conveyance executed after the making of the earlier decisions, and before they were overruled, and do not furnish the true rule of interpretation thereof. — *Allen v. Allen*, 184.
7. **DELIVERY OF DEED — INTENT — RECORDING — DEATH OF GRANTEE — SUFFICIENCY OF DELIVERY.** — Where a deed of realty was delivered to the grantee, with the intention of vesting the title thereto in the grantee, the fact that the grantor requested the grantee to refrain from recording the instrument until after the grantor's death is entirely immaterial; and the grantor's belief, that if the grantee died before the grantor that he could conceal or destroy the deed and thereby reinvest the title in himself, does not militate against the sufficiency of the delivery at the date of the conveyance, or destroy his clear intention to part

DEEDS (Continued).

- with the title and vest the same in the grantee. — *Dimitich v. Dimitich*, 323.
8. BOUNDARY — CENTER OF HIGHWAY — PRESUMPTION — EFFECT OF DEED. — An owner of land bounded by a road or street is presumed to own to the center of the way, and when one conveys land bounded by a highway, he passes his title to the center of the highway, subject to the public easement, unless a different intent appears from the grant. — *Fraser v. Ott*, 661.
9. GRANT OF TWO ACRES OF BLOCK ADJOINING STREET — DESCRIPTION — MEASUREMENT OF QUANTITY. — A conveyance of two acres of a block adjoining a street passes title to half of the adjoining street, subject to the public easement; but it does not necessarily follow that the two acres must be measured by going to the center of the street; and if the deed describes the blocks as four-acre blocks, which appears to be the size of the blocks, exclusive of the adjoining streets, the description of the north two acres of a specified block in effect describes the north half thereof, exclusive of the street, especially where the deed describes a right of way as conveyed over the east end of the south half of the same block. — *Id.*
10. DEFINITION OF "BLOCK." — A "block" is a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots, and this is the meaning of the word as used in a conveyance of the north two acres of a four-acre block. — *Id.*
11. DEED IN CONSIDERATION OF LEGAL SERVICES — TRUST — REPUDIATION OF CONTRACT — FAILURE OF CONSIDERATION — UNDUE INFLUENCE — RESCISSION — PLEADING — SUFFICIENCY OF CAUSE OF ACTION — SPECIAL DEMURRER. — A complaint which alleges that the plaintiff's ancestor conveyed to the defendant's wife certain real estate for the expressed consideration of legal service to be rendered by the defendant, and that the defendant agreed to examine and quiet the title to the property at his own cost and expense, and then to reconvey one-half thereof to the grantor, but that although eight years had elapsed since the conveyance of the property to the defendant's wife, the appellant had not performed or attempted to perform his agreement; that the title to the property is still clouded, and that the conveyance and agreement were without consideration, and were procured solely by the undue influence of the defendant; that the defendant not only made no attempt to perform the agreement which constituted the whole consideration for the conveyance, but in violation of the trust so created, had sold a portion of the property, appropriating the proceeds to himself, and repudiating the obligations of the agreement and trust, and claiming to be the absolute owner of the property, — although inconsistent, illogical, and insufficient as against a special demurrer, is sufficient, in the absence thereof, to support a decree that the deed to the defendant's wife was void against the plaintiff, except as to the portion conveyed to a bona fide purchaser without notice. — *De Pedorena v. Hotchkiss*, 636.
12. DEED BY AGED WOMAN TO NEPHEW — CONSIDERATION — PREVENTION OF SUPPORT — CANCELLATION. — Where a woman nearly seventy years of age, with no children or relatives in this state, made a deed reserving a life estate in herself, and granting a remainder in fee of her real estate

DEEDS (Continued).

to her nephew, who, at her request, came to this state from New Jersey, at his own expense, to live with her, take care of her, attend to her business, and improve her home, and make it more comfortable, in consideration of the deed, and it appears that she was, at the time of the making of the deed, of sound mind, and executed and delivered it voluntarily, in the absence of fraud or undue influence, and that the nephew and his wife in good faith came to this state to make their home with her, and cared for her, and spent four hundred dollars in repairing and enlarging the house, when she changed her mind, and would not permit them to remain, through no fault of theirs, and that after they left they offered to send her money if she needed it, or to return and rent the property, which offer she refused because she had remarried, the deed will not be set aside at suit of herself and husband.—*Oreswell v. Welchman*, 359.

13. GIFT OF COMMUNITY PROPERTY — FRAUD UPON WIFE. — A deed of gift by the husband of a portion of the community property, in order to be a fraud upon the wife, must be made with a fraudulent intent, and is not void *per se*. — *Corker v. Corker*, 308.
14. DELIVERY OF DEED — EVIDENCE — INTENTION OF GRANTOR. — Where the grantor delivered the deed to a third person, and the latter carried it to another, stating that the grantor wished him to record it and then deliver it to the grantee, testimony of the person to whom it was last given, as to whether or not he would have delivered it back to the grantor if he had called for it or sent for it, is irrelevant and inadmissible upon the question of the intention of the grantor as to the delivery of the deed. — *Id.*
15. LEASE — OPTION TO PURCHASE — PURCHASE OF PART BY LESSEE — RIGHTS OF OTHER PURCHASERS FROM LESSOR. — Where, by the terms of a lease, the lessee had the option to purchase the land within thirty days after notice by the owners of the land, and while he was in possession of the land under the lease, and entitled to purchase, the owners of the land, by a deed of grant, bargain, and sale, conveyed a part of the land to him, the fact that the grantors had, prior to the deed but subsequent to the lease, entered into an agreement for the sale of the property to other parties, could not deprive him of the benefit of his agreement and conveyance, or entitle them to any greater rights in the portion of the tract sold to him than those named in the exceptions and reservations contained therein. — *Diets v. Mission Transfer Co.*, 92.
16. EXCEPTIONS IN DEED — RIGHT TO BORE FOR OIL. — Where the deed to the lessee of part of the tract expressly excepted from its operation "all oils, petroleum, asphaltum, and other kindred mineral substances," and contained a reservation of "the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the premises," etc., a purchaser of the rights of the grantor, although not having the right to use the land conveyed to the lessee for the purpose of pumping or storing oil found in other portions of the tract, has the right to go upon such part of the tract to develop it, and to tunnel and dig to ascertain whether any oil croppings exist, although there are none on the surface, being held to a reasonable exercise of the right to develop the oil. — *Id.*

DEEDS (Continued).

17. **EJECTMENT — JUDGMENT IN PRIOR ACTION AGAINST LESSEE — RES ADJUDICATA — DIFFERENT SUBJECT-MATTER.** — A judgment for the plaintiffs in an action between the grantors of the lessee and their other grantee on the one part, and the lessee and others on the other part, wherein the plaintiffs alleged that the lessee's rights under his lease had ceased by failure to purchase within the time provided for, and sought to restrain him from hindering the grantee plaintiff from entering upon the land to explore, develop, and extract oil therefrom, and in which the only thing considered and determined was the right of the lessee to retain possession of the land under his lease for the purposes therein specified, is not a bar to an action of ejectment by such lessee against the grantee plaintiff, in which the question as to the lessee's right to the possession as owner in fee of a part of the tract is involved, and in which he makes no claim of right to extract oil from the land, and does not dispute the right of the defendant to occupy the land for the purpose of taking oil, if oil exists. — *Id.*
18. **DEED OF FIXTURES — IMPLIED RIGHT TO OPERATE FIXTURES AND OCCUPY LAND.** — A deed from the lessee and another person, of grant, bargain, and sale, conveying to the other grantee of the lessor all their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated upon any portion of the tract conveyed to the grantee not merely the pipes, tanks, derricks, etc., as personal property, but carried with it the right to operate the same in the manner they theretofore had been operated by the grantee, and also the right to occupy sufficient land for the purpose of such use and operation. — *Id.*

See STATUTE OF LIMITATIONS, 1-5; TRUST; VENDOR AND VENDEE.

DESCRIPTION. See DEEDS, 1-5.

DIVORCE.

1. **ADULTERY — PLEA OF CONDONATION — QUESTION OF FACT — CONCLUSIVENESS OF FINDING.** — In an action for divorce upon the ground of adultery, where the defendant, after denying the charge of adultery, alleged a condonation by the plaintiff, and his cohabitation with her after the bringing of the action; and the defendant testified that after the commencement of the action she went to a cottage with him at his request, where they undressed and went to bed together, and that they staid there most of the afternoon and had sexual intercourse: and the plaintiff testified that he did not have sexual intercourse with her, as stated by her, nor at any time after the commencement of the action, but did not say whether he had undressed and occupied the bed with her in the cottage, — a finding by the court against the plea of condonation is conclusive. The question of the plaintiff's credibility, and the probability of his statement in view of his failure to deny that he undressed and went to bed with the defendant, as stated by her, are matters for the determination of the trial court. — *Bohnert v. Bohnert*, 444.
2. **RESTORATION TO MARITAL RIGHTS — ACT OF SEXUAL INTERCOURSE.** — The requirement of a "restoration of the offending party to all marital rights," under section 116 of the Civil Code, in order to constitute con-

DIVORCE (Continued).

donation, is not proved by evidence of sexual intercourse alone; and the fact that a wife charged with adultery went to a cottage with her husband at his request, and that they went to bed and had sexual intercourse, does not necessarily show forgiveness or intention on his part to take her back to his home and restore her to marital rights. — *Id.*

3. EXTREME CRUELTY — CONSIDERATION OF CIRCUMSTANCES. — What acts of a spouse will constitute extreme cruelty, within the meaning of the statute providing for a divorce upon that ground, cannot be defined with precision; but each case is to be determined, according to its own peculiar circumstances, by the good sense and judgment of the court or jury, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party. — *Fleming v. Fleming*, 430.

4. GRIEVOUS MENTAL SUFFERING — QUESTION OF FACT. — Whether in any given case there has been inflicted grievous mental suffering upon one of the spouses is a pure question of fact to be deduced from all the circumstances of each particular case. — *Id.*

5. PLEADING — ATTEMPT AT INTERCOURSE WITH DOMESTIC — PUBLICITY OF CHARGE — INJURY TO WIFE'S HEALTH — CONCLUSIVENESS OF FINDING. — Where a complaint, in an action for a divorce by a wife on the ground of extreme cruelty, alleged that the defendant attempted to have sexual intercourse with their domestic, and that such conduct on the part of the defendant received great publicity by reason of a complaint having been made by the domestic before a magistrate, charging the defendant with assault with intent to commit a rape upon her, and that afterwards he threatened to turn the plaintiff out upon the world penniless unless she would help him to keep the domestic from prosecuting him on the complaint, and that such conduct on the part of the defendant, and the publicity given to it, caused the plaintiff grievous mental suffering, thereby greatly impairing her health, it cannot be said, as a matter of law, that such conduct did not inflict grievous mental suffering upon her, and a finding by the court that it did is conclusive upon appeal, in the absence of evidence in the record. — *Id.*

6. PRESUMPTION — INTENTION TO ANNOY WIFE. — Such conduct of the defendant being voluntary and inconsistent with marital integrity, it will be conclusively presumed that he intended the natural and ordinary effect thereof upon his wife; and the law will not condone the offense, upon the ground that the acts imputed to him were not willfully done to annoy or vex the plaintiff, and that he did not suppose any publicity would be given to them, or that his wife would be told about them. — *Id.*

7. EXTREME CRUELTY — MENTAL SUFFERING — CHARGES OF PERSONAL IMPURITY — EFFECT UPON HEALTH. — A finding that the defendant, in an action for divorce upon the ground of extreme cruelty, inflicted grievous mental suffering upon the plaintiff, by imputing to him, in the presence of others, the grossest immorality and personal impurity, is a sufficient finding of extreme cruelty to sustain a judgment for the plaintiff. It is not necessary to allege or find that the charges complained of had an injurious effect upon the health of the plaintiff. — *Barnes v. Barnes*, 171.

DIVORCE (Continued).

8. DEFINITIONS OF EXTREME CRUELTY. — Any unjustifiable conduct upon the part of either of the spouses, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty. — *Id.*
9. GAUGE OF MENTAL SUFFERING. — It is not necessary that there should be any exact measure or scale by which to gauge purely mental susceptibilities and sufferings. — *Id.*
10. QUESTION OF FACT — DELICACY OF FEELING. — Whether in any case there has been inflicted such grievous mental suffering as will warrant the granting of a divorce upon the ground of extreme cruelty, is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given. — *Id.*
11. ANNULMENT OF MARRIAGE — ALIMONY PENDENTE LITE — DETERMINATION OF ISSUES — REVIEW UPON APPEAL. — Upon the hearing of a motion for alimony *pendente lite* and counsel fees, in an action for the annulment of a marriage, the trial court cannot determine the issues raised by the pleadings, and the supreme court has no jurisdiction to determine them upon appeal from an order granting such motion, nor to determine the correctness of an order overruling a demurrer to the complaint. — *Pool v. Wüder*, 839.
12. ISSUE AS TO SUBSEQUENT MARRIAGE — ALLOWANCE OF ALIMONY. — Where the marriage is claimed to be a nullity, and is sought to be annulled on the ground of a previous marriage of the defendant with another person, but the defendant avers a subsequent marriage with the plaintiff after the disability was removed, and prays for alimony, upon appeal from an order allowing alimony to the defendant, it need not be considered whether the issue as to the subsequent marriage is sustained upon the hearing of the motion. — *Id.*
13. ALIMONY WITHOUT CLAIM FOR DIVORCE — CROSS-COMPLAINT OF WIFE. — Under section 187 of the Civil Code, which provides that the wife in case of desertion may maintain an action for permanent support without applying for a divorce, and that the court may, in its discretion, require the husband to pay alimony during the pendency of the suit, and money necessary for the prosecution of the action, a wife who is sued for the annulment of a marriage may file a cross-complaint for relief under that provision. — *Id.*
14. AMOUNT OF ALIMONY — DISCRETION AS TO ALLOWANCE. — Upon a motion for an order granting alimony *pendente lite* and counsel fees to the defendant, where the affidavits used upon the hearing show that the only property belonging to the parties or to either of them is a house and lot, to the procurement of which both parties contributed, the title to which is in the defendant, and which is occupied by her, but that it produces no income; that the defendant has no means of support, and that the plaintiff's income is about \$145 per month, — an order by the court that the plaintiff pay to the defendant \$45 per month, and \$100 counsel fees, is not an abuse of discretion. — *Id.*

DIVORCE (Continued).

15. **DISMISSAL — ATTORNEY AND CLIENT — MANDAMUS — REMEDY AT LAW — SUBSTITUTION OF ATTORNEYS — CONDONATION.** — It seems that the attorneys for the plaintiff in a divorce suit are not entitled to insist that the cause be retained until their fees are paid, against the expressed wish of their client to dismiss the action; but *mandamus* to the court is not the proper remedy to compel such dismissal, the plaintiff having an adequate remedy to secure the dismissal, if desired, by a substitution of attorneys; and as the affidavit and prayer for dismissal filed in the action by the plaintiff constitute a condonation by which the defendant can at any time defeat the action, the defendant is not entitled to a writ of mandate to compel the dismissal. — *Thelma v. Superior Court*, 224.
16. **JURISDICTION OF SUPERIOR COURT — CARE AND CUSTODY OF MINOR CHILDREN — PLEADING.** — In an action for a divorce, the superior court has jurisdiction, under section 188 of the Civil Code, to make such orders for the custody and maintenance of minor children of the marriage as may seem to be necessary, although the pleadings contain no specific allegations as to the fitness of the respective parties, or their ability or willingness to care for their offspring, nor any prayer respecting the custody thereof. — *Ex parte Gordon*, 374.
17. **ORDER AWARDING CHILD TO GRANDMOTHER — APPOINTMENT OF GUARDIAN.** — It is no objection to the validity of an order in such action, awarding the custody of a minor child of the parties to its grandmother at the expense of the husband, that there were no proceedings under sections 1747 et seq. of the Code of Civil Procedure, prescribing the proceedings for the appointment of guardians generally. — *Id.*
18. **ORDER FOR PAYMENTS TO AGENT OF COURT — JUDGMENT — PARTIES.** — Where, by order of the court, in an action for divorce, the custody of the child of the marriage has been awarded to its grandmother, a further order that the father pay to the grandmother a monthly allowance for the support of the child is an order for the payment of money to an agent or officer of the court charged with the duty of carrying its decree into effect, and is not void as being a judgment in favor of a stranger to the action. — *Id.*
19. **POWER OF COURT — SUPPORT OF CHILD BY FATHER.** — The power of the court, in an action for a divorce, to compel the father to support his minor child does not depend wholly upon section 189 of the Civil Code; and whether he is with or without fault in the matters involved in the action, it is his duty to support such child, and the court may compel him to do so, though the child is given to the custody of a stranger to the action. — *Id.*
20. **WIFE'S FORFEITURE OF SUPPORT — RIGHTS OF CHILDREN.** — Although a wife, by her fault in the matters involved in an action for a divorce, may forfeit her own claim to be supported by her husband, she cannot forfeit the claims of their children to such support. — *Id.*
21. **MISNOMER OF CHILD — IDENTIFICATION.** — An order that the husband pay a monthly allowance for the support of a minor child designated as "Lina" or "Lena" Gordon is not void as being an order for the support of a different person from "Leah" Gordon, though the names are not the same, nor are they *idem sonans*, where it appears that the child is

DIVORCE (Continued).

referred to throughout the proceedings as the sole issue of the parties to the action, and is thereby identified. — *Id.*

See CONTEMPT; PRACTICE, 2.

DRUNKENNESS. See HOME FOR CARE OF INEBRIATES.**EJECTMENT.**

1. **POSSESSION OF LAND—INCLOSURE OF EXTERIOR BOUNDARIES OF TWO TRACTS HELD IN SEVERALTY—TRESPASS—CONTEST OF POSSESSORY RIGHTS.**—If two owners in severalty of adjoining tracts of land by mutual consent inclose the two tracts together by a fence around the exterior boundaries of both, the inclosure thus made constitutes possession as against any third party who is a mere intruder; and it is immaterial whether the lands are public or private, where the contest is merely one of alleged possessory rights between the parties to the action. — *Reay v. Butler*, 206.

2. **RECOVERY MUST BE UPON STRENGTH OF PLAINTIFF'S TITLE.**—In an action of ejectment, the plaintiff must rely upon the strength of his own title, no matter how weak the title of his opponent may be. — *Id.*

3. **INSUFFICIENT ACTS OF POSSESSION—ATTEMPTS TO BUILD SHANTIES—DESTRUCTION BY ADVERSE CLAIMANT.**—The acts of the plaintiff in employing two men to build a small wooden shanty on the land claimed by him, who worked upon it two days, when the adverse claimant tore it down, and drove the men away, and in returning a few days afterward, and again attempting to build a wooden shanty, when he was again driven off, and the shanty torn down, do not constitute even a scrambling possession of the land beyond the spot on which the shanties were commenced to be built; and such a possession will not support an action of ejectment for the tract on which the shanties were sought to be erected. — *Id.*

4. **CONSTRUCTIVE POSSESSION—DEED NOT TAKEN IN GOOD FAITH—COLOR OF TITLE.**—A party who takes a deed to land not in good faith, believing that the grantor has any title to the land, but for the express purpose of asserting color of title, cannot invoke the doctrine that one entering upon land under color of title given by a deed has constructive possession to the extent of its boundaries. — *Id.*

See DEEDS, 17.

ELECTION. See MUNICIPAL CORPORATIONS.**ELEVATOR. See NEGLIGENCE, 1-4.****EMINENT DOMAIN.**

1. **POSSESSION PENDING LITIGATION—REVERSAL OF JUDGMENT—CONSTITUTIONAL LAW.**—Section 1254 of the Code of Civil Procedure, in regard to proceedings for the condemnation of property for public use, allowing an adequate fund to be paid into court, whereupon the court "may authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession and use the property during the pendency of and until the final conclusion of the litigation," etc., is not in conflict

EMINENT DOMAIN (Continued).

with the constitution, but the allowance of the continuance of possession after the reversal of a judgment upon appeal "until the final conclusion of the litigation" is within the power of the legislature. — *Spring Valley Water Works v. Driskhouse*, 220.

2. **RESTITUTION OF POSSESSION — DISCRETION OF APPELLATE COURT — CONSTRUCTION OF CODE.** — Section 957 of the Code of Civil Procedure, which provides that the appellate court may make complete restitution of all property and rights lost by an erroneous judgment or order which is reversed or modified, is not mandatory upon the court, and does not give appellant an absolute right to a restitution of possession, but the power conferred thereby is to be exercised in the discretion of the court. — *Id.*

3. **CONDEMNATION OF LANDS FOR RESERVOIR — NECESSITY OF TAKING FINALLY DETERMINED — REVERSAL ON QUESTION OF VALUE.** — In proceedings to condemn lands for a reservoir, which is to be used to supply San Francisco and its inhabitants with water, where it has been finally determined in the action that the use to which the plaintiff proposes to put the land is authorized by law, and that its taking by the plaintiff is necessary to such use, and a judgment for the plaintiff is reversed for the sole purpose of determining upon a new trial the amount of compensation and damage to be awarded to the defendant, and it appears that plaintiff has been allowed to take possession until the final conclusion of the litigation, under section 1254 of the Code of Civil Procedure, and it is contended that the amount deposited under that section is not adequate to satisfy any judgment that may be recovered at any future trial, there is nothing to demand the exercise of the discretionary power vested in the appellate court to compel restitution of possession upon such reversal. — *Id.*

See **WATER AND WATER RIGHTS**, 1-9.

ESTATES OF DECEASED PERSONS.

1. **SETTLEMENT OF FINAL ACCOUNT — ORDER APPOINTING EXECUTOR — NOTICE TO HEIRS — ESTOPPEL.** — Where the order appointing an executor, and under which he qualified as such, recited that citations had been duly issued and served, and notices duly given according to law, and the executor took charge of the property of the estate as executor, holding possession thereof for many years until cited by a legatee to render a final account, claiming no right save as executor, he is estopped from claiming, upon a settlement of his final account, that the order appointing him as executor was void because proper citations to the heirs were not issued and served. — *Estate of Moore*, 34.
2. **DEVISE IN TRUST — ACCUMULATION FOR BENEFIT OF SON — SUPPORT OF FAMILY — NEGLECT OF EXECUTOR.** — Where an executor was appointed by the will of the testator as a trustee to invest a sum of money in trust for the testator's son, and to allow the increase to accumulate until the son should attain majority, when the sum, and the increase thereof, was to be paid him, and in the next clause of the will the residue of the estate, after the payment of debts, was given to the executor, in trust, to pay the interest thereon, and so much of the principal as might be necessary, to the widow of the testator, for her support, and for the support

ESTATES OF DECEASED PERSONS (Continued).

and education of his son, the expenditure by the executor of a large sum for the erection of a building upon property belonging to the estate, the rents of which were paid to the boy's mother for their support, cannot take the place of the investment first directed to be made, and accumulated for the benefit of the son, or excuse the failure of the executor to make such investment. — *Id.*

3. LIABILITY OF EXECUTOR — USE OF LEGAL-TENDER NOTES TO BE INVESTED IN TRUST — GOLD VALUE — INTEREST. — Where the executor failed to procure an order to distribute the sum of three thousand dollars in legal-tender notes, devised to him as trustee, in trust, for investment and accumulation of interest, and made no investment thereof, but used the money in his own business for many years, he is chargeable in his final account with the value of the legal-tender notes in gold at the time when the investment should have been made, with interest on such value, and cannot be charged with the difference between the face amount of the legal-tender notes and their value in gold, and interest on the face amount of the notes. — *Id.*

4. CONTEST OF WILL — UNDUE INFLUENCE — PLEADING — ACTS PRIOR TO WILL — IMPORTUNITIES OF RESIDUARY LEGATEE. — A contest of a will on the ground of undue influence, which alleges acts of undue influence, and importunity continued for a long time prior to the making of the will, sufficiently connects the alleged undue influence with the testamentary act, by alleging that at the date of the will, and while in an enfeebled condition of mind and body, and unable to resist the importunities of one of the residuary legatees, deceased made his mark to said pretended will. — *Estate of McDevitt*, 17.

5. VERDICT OF UNDUE INFLUENCE — NEW TRIAL — EVIDENCE INSUFFICIENT IN LAW. — Where the evidence is insufficient, as matter of law, to justify a verdict, or decision that a will was executed under undue influence, it is ground for a new trial. The evidence in this case reviewed, and held insufficient in law to sustain such a verdict. — *Id.*

6. EVIDENCE — DECLARATIONS OF TESTATOR — TESTAMENTARY INTENTIONS — *RES GESTÆ* — WEIGHT OF EVIDENCE. — Expressions of the deceased as to his testamentary intentions, though admissible to prove a friendly feeling toward the persons in regard to whom they are used, yet do not tend to prove that a will conforming to such expressions was procured through undue influence, unless made so near the time of the execution of the will as to constitute a part of the *res gestæ*; and where the testator is beyond question of sound mind, they are entitled to no weight at all, in the absence of proof of influence as to the very testamentary act. — *Id.*

7. FAIRNESS OF TESTAMENTARY DISPOSITION — DIVISION OF PROPERTY AMONG NEPHEWS AND NIECES. — Not to divide the property of a testator equally among nephews and nieces does not make his will undutiful or inequitable. An uncle is under no obligation, ordinarily, to provide for his nephews, either when living or by his will. — *Id.*

8. JUDICIOUS DISPOSITION. — A testator of sound mind has a right to make an unjust, unreasonable, or even a cruel will, and if no apparent restraint or undue influence is proved to have induced its execution, the

ESTATES OF DECEASED PERSONS (Continued).

will must be sustained, whether the disposition made of his property is judicious or not.—*Id.*

9. **GENERAL INFLUENCE — EVIDENCE — PRESUMPTION.** — General influence, not brought to bear directly upon the testamentary act, however strong or controlling, is not undue influence, such as will afford ground for the setting aside of a will of a person of sound mind. There must be evidence, either direct or circumstantial, that pressure was brought to bear directly upon the testamentary act, and there is no presumption against the will, except in cases where the beneficiaries, or parties instrumental in having the will executed, sustain a confidential relation to the testator, or where the testator is weak, physically and mentally, and those having exclusive access to him have procured an unnatural will. — *Id.*
10. **CIRCUMSTANTIAL EVIDENCE — SUSPICION — DEGREE OF PROOF REQUIRED.** — While circumstantial evidence may be sufficient to prove undue influence upon the testamentary act, it must do more than raise a suspicion, and has the force of proof only when the circumstances proved are inconsistent with the claim that the will was the spontaneous act of the testator. It does not amount to proof if the circumstances are equally consistent with the theory of undue influence, and with the hypothesis that the will was the free act of an intelligent mind, especially if other circumstances are wholly inconsistent with the hypothesis of undue influence. — *Id.*
11. **PRESUMPTION OF LAW.** — The presumption of law, in the absence of all proof, upon the contest of a will, is in favor of the will. — *Id.*
See **TRUST**, 8, 9.

ESTOPPEL. See **DEDICATION**, 6; **ESTATES OF DECEASED PERSONS**, 1; **PLEADING**, 6; **PRACTICE**, 17, 21; **VENDOR AND VENDEE**, 4.

EVIDENCE.

1. **JUDICIAL NOTICE — COMPARISON OF CONDITIONS IN DIFFERENT COUNTRIES.** — The court will not take judicial notice whether the conditions as to climate, soil, topography, and rainfall are the same in one county as in another. — *Santa Cruz v. Enright*, 105.
2. **DEFALCATIONS OF AGENT — OVER-DRAFTS TO PAY DEFALCATIONS.** — In an action by a bank against a steamship company to recover a sum of money alleged to have been overdrawn from the bank by the company, evidence upon the part of the defendant tending to prove the amount of the defalcations of a local agent of the company, who had overdrawn his accounts with the bank, that his over-drafts were made to pay the amount he was behind in his accounts with the defendant, and that at the time of the over-drafts he had money of the defendant's on hand sufficient to pay all claims against the defendant, is admissible, as tending to prove that the over-drafts were not loans to the defendant, and that the agent had neither express nor implied authority from the defendant to make them; but that they were made by the agent for the purpose of paying his own debt to the defendant. — *Consolidated Nat. Bank v. P. O. S. S. Co.*, 1.
3. **TRIAL — ERROR WITHOUT PREJUDICE — EXAMINATION OF WITNESS — ANSWERS TO QUESTIONS OBJECTED TO.** — The sustaining of an objection

EVIDENCE (Continued).

to questions asked of a witness cannot be prejudicial error, where the witness is afterwards permitted to answer and does fully answer the questions. — *Id.*

4. **MEANING OF ABBREVIATIONS — PRINTED MATTER — EXPLANATION OF CONTRACT — RULES OF BOARD.** — Where printed matter, not described in the complaint, composed of extracts from the rules of the Produce Exchange and Call Board of San Francisco, appeared above the written contract pleaded, and it was testified by some of the witness that the phrase "S/87 wheat," used in the written contract, meant that the seller was to have the season of 1887 in which to complete his contract, and that the wheat should be "number one white wheat," and there was also testimony that the phrase meant that the wheat was not to be delivered, but that the seller was simply to produce "call-board contracts" for the wheat, evidence should be admitted to show whether the printed matter above the manuscript was a part of the contract, or whether it should be considered as a "board contract," or whether the phrase had any other meaning than that given to it by such board, and what that meaning is, and also to show what are the rules and regulations of the stock and exchange board, and it is error to exclude such evidence. — *Berry v. Kowalsky*, 184.
5. **DECLARATIONS OF DEFENDANT'S GRANTOR — ABANDONMENT — GENERAL CONVERSATIONS — LEADING QUESTIONS — RULING NOT PREJUDICIAL.** — During the examination of a witness for the plaintiff in ejectment as to the declarations of one of the parties through whom the defendant claimed title, as to the abandonment of his claim to the land, it is not error to sustain an objection of the defendant to general conversations relating to the land, and to a leading question asked as to whether he said he would not return to the land, and when the witness, in answer to the question as to whether he said anything about the land, and what he said, without objection told what he did say, the ruling could not be prejudicial. — *Reay v. Butler*, 208.
6. **DECLARATIONS — HEARSAY.** — Where the fact sought to be established is, that certain words were spoken, without reference to the truth or falsity of the words, whether by a party to the action as an admission of a fact, or to him as a notice, or under such circumstances as to require action or reply from him, the testimony of any person who heard the statement is original evidence, and not hearsay. — *Smith v. Whittier*, 279.
7. **ADMISSION — WILLINGNESS TO SETTLE — OFFER OF COMPROMISE.** — The statement of a party against whom a claim is made, that he is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest. The rule which excludes offers of compromise does not apply to statements made by a party which are in no wise connected with an attempt at a compromise, whether made to a stranger or to a co-defendant. — *Id.*
8. **PAROL EVIDENCE — NEW WRITTEN CONTRACT — SUPERSEDING FORMER BY ORAL AGREEMENT.** — Parol evidence offered for the purpose of showing that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the action is based, had been executed upon the consideration and agreement that the prior contract should be canceled, and all claims of the plaintiff against the

EVIDENCE (Continued).

defendant thereunder waived, is not competent as having the effect to vary or contradict the terms of either of the written instruments, or to add any terms thereto. — *Guidery v. Green*, 880.

9. EXECUTED PAROL AGREEMENT — CANCELLATION OF WRITTEN CONTRACT — SUBSTITUTION OF NEW CONTRACT — NOVATION. — It is competent to show by parol evidence that the former written contract was canceled as between the parties, and has no longer any existence, and to show an oral agreement for the substitution of a new written contract that was fully executed by the substitution, which is, in effect, to prove a novation. — *Id.*
10. CONSIDERATION OF WRITTEN CONTRACT — PAROL EVIDENCE. — It is competent to show that the oral agreement was the consideration upon which the new written contract was executed, the instrument being itself silent upon the subject of its consideration. — *Id.*
11. COLLATERAL PAROL AGREEMENT. — Proof of a collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of the terms of a written contract, is always admissible, even though it may relate to the same subject-matter. — *Id.*
12. TERMS OF WRITTEN AGREEMENT. — When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and as between the parties there can be no other evidence of the terms of the agreement, except in certain cases mentioned in section 1856 of the Code of Civil Procedure. — *Beall v. Fisher*, 568.
13. MERGER OF ORAL NEGOTIATIONS. — All the oral negotiations and agreements concerning the exchange of lands are merged in the deeds and mortgages given in pursuance of such negotiations, and evidence of prior negotiations contradicting the terms of such instruments is inadmissible. — *Id.*
 See APPEAL, 11-14; CORPORATIONS, 12-14, 16; CRIMINAL LAW, 11, 13; DEEDS, 1, 2, 4, 5, 14; ESTATES OF DECEASED PERSONS, 5, 6, 9, 10; FINDINGS, 1; NEGLIGENCE, 1, 4; NEW TRIAL, 7, 8; PARTNERSHIP, 1, 8; PLEADING, 14, 17; PRACTICE, 4; TRUST, 9; WATER AND WATER RIGHTS, 4-6.

EXECUTION.

1. PROCEEDINGS SUPPLEMENTARY TO EXECUTION — ORDER AUTHORIZING JUDGMENT CREDITOR TO SUE — CONSTITUTIONAL LAW. — Section 720 of the Code of Civil Procedure, providing that the judge may, by order, authorize a judgment creditor to institute and maintain an action against an alleged debtor of the judgment debtor, is not unconstitutional, on the alleged ground that the judgment debtor has under it no notice of the supplementary proceeding after judgment affecting his rights of property, or that his debtor may be compelled to pay the debt twice. — *Hugh v. Bank of Commerce*, 886.
2. ACTION AGAINST GARNISHEE — PLEADING — JUDGMENT — ORDER AUTHORIZING SUIT. — Allegations in a complaint against a garnishee, in an action by a judgment creditor, authorized in proceedings supplementary to execution against the judgment debtor, that the assignor of the plaintiff "recovered a judgment" in the superior court, "which judg

EXECUTION (Continued).

ment was duly entered," etc., and that the order authorizing the suit was "duly made," are sufficient as against a general demurrer. — *Id.*

See APPEAL, 4, 19, 20; ATTACHMENT.

EXECUTORS AND ADMINISTRATORS. See ESTATES OF DECEASED PERSONS.

EXTREME CRUELTY. See DIVORCE, 3-10.

FAMILY. See HOMESTEAD, 6, 7.

FARMING NEIGHBORHOOD. See WATER AND WATER RIGHTS, 7, 8.

FINDINGS.

1. **WAIVER OF FINDINGS — IMPLIED FINDINGS — APPEAL — PRESUMPTION — REVIEW OF EVIDENCE.** — Although there are no express findings, and it appears from the record upon appeal that findings were waived, still it will be presumed that the court found all the matters of fact in issue and necessary to support its judgment in favor of the successful part. Such findings are implied; and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding. — *Blanco v. Paymaster Mtn. Co.*, 524.
2. **APPEAL — WAIVER OF FINDINGS — PRESUMPTION — FAILURE TO FIND UPON MATERIAL ISSUE.** — Where the record upon appeal contains findings of fact and law, it cannot be presumed that a finding upon a material issue was waived; and a failure to find upon such issue is an error for which the judgment will be reversed. — *Ball v. Kehl*, 606.
3. **OMISSION TO FIND AS TO ADVERSE USER.** — Where the plaintiff claims a prescriptive right as the basis of an injunction, a finding upon the issue as to his adverse user is material, and a judgment in his favor cannot be supported without such finding where findings are not waived. — *Id.*
4. **CONTROL OF JUDGMENT — FAILURE TO FIND.** — Where the finding of a certain fact necessarily controls the judgment in an action, the failure of the court to find upon other issues does not constitute reversible error. — *Southern P. R. R. Co. v. Dufour*, 615.
5. **ACTION FOR CONVERSION OF GOODS — JUDGMENT FOR DEFENDANT — FAILURE TO FIND VALUE OR DAMAGE.** — A judgment for the defendant for costs, upon findings in his favor in an action for conversion of goods, is not rendered erroneous by the absence of an express finding on the issue of value and damage. — *Dieffendorff v. Hopkins*, 348.
6. **ISSUES RENDERED IMMATERIAL.** — The failure to find upon an issue which has become immaterial is not a prejudicial error. The parties to an action have no right to a finding upon every specific issue in a case merely because they may plead it as *res adjudicata* in some possible future controversy where it may become material. — *Id.*

See CONTRACTS, 9, 10; JUDGMENT, 4; PLEADING, 9; WATER AND WATER RIGHTS, 12, 14.

FIXTURES. See DREDS, 13.

FORFEITURE. See **CONTRACTS**, 2-5; **STREETS, ROADS, AND HIGHWAYS**.

FRANCHISE. See **CONSIDERATION**; **STREETS, ROADS AND HIGHWAYS**, 1-7.

FRAUD. See **CORPORATIONS**, 20; **INSOLVENCY**, 1; **PARTIES**; **STATUTE OF FRAUDS**.

GIFT. See **COMMUNITY PROPERTY**, 3, 4; **DEEDS**, 13.

GRANT. See **DEEDS**.

GROWING CROPS.

CONTRACT FOR CROP TO BE SOWN — RIGHT TO VOLUNTEER CROP ON LAND NOT SOWN. — Under a contract by the terms of which the owner of land agreed to furnish 140 acres of land, "more or less," to another person to sow in wheat, in consideration of an interest in the crop, and the latter agreed "to plow and put in wheat the above-mentioned land, in good farmer-like style," whether such contract be considered a lease or a cropping contract, the person sowing the crop has no right in any of the land except that which he sows in wheat, and is not entitled to any part of a volunteer crop growing upon a part of the 140 acres not sown in wheat by him. — *Shaw v. Mayer*, 801.

GUARANTY.

1. **ASSURANCE BY LESSOR TO EMPLOYER OF LESSEE.** — A letter from the lessor of land to a party contemplating the rendition of services to the lessee, telling him to rest assured that he would get his pay for all work done, written in response to an inquiry from the party contemplating the services as to whether he would be paid for his work, does not amount to a guaranty. — *Switzer v. Baker*, 539.
2. **AGREEMENT TO PAY DEBT OF ANOTHER — AMBIGUOUS LANGUAGE.** — An agreement to pay the debt of another cannot be inferred from doubtful language, which, although it might be capable of being construed as a guaranty, does not exclude an inference equally reasonable that it was only intended to express confidence in the financial ability and integrity of the debtor. — *Id.*

GUARDIAN AND WARD.

1. **ACTION — PARTIES — MISJOINDER OF GUARDIAN — DEMURRER.** — A guardian cannot be joined with the ward as a party defendant, where the cause of action affects only the interests of the ward, and he may demur in such case on the ground that the complaint states no cause of action against him. — *O'Shea v. Wilkinson*, 454.
2. **APPEARANCE OF GUARDIAN.** — The guardian appears in the action simply to manage and take care of the interests of the ward or infant for whom he appears, and does not thereby become a party to the action. — *Id.*
3. **EFFECT OF DISMISSAL AS TO WARD.** — Where an action is brought against an incompetent person, who appears and answers by a general guardian, and no attempt is made to charge the guardian in his individual capacity, a dismissal of the action as to the ward is in effect a dismissal of the action itself. — *Id.*

See **DIVORCE**, 17.

HABEAS CORPUS. See PARENT AND CHILD.

HARBOR COMMISSIONERS.

1. **ACTION ON WHARFINGER'S BOND — USE OF NAME OF PEOPLE — ATTORNEY-GENERAL.** — Under section 2523 of the Political Code, providing that the board of state harbor commissioners may institute and prosecute to final judgment actions in the name of the people of the state for the collection of any money due, or that may become due, under the authority of article IX., part III., title VI., of the Political Code, the board has authority to use the name of the people without the relation of the attorney-general, in an action against the sureties of a wharfinger to recover moneys lost to the board by his delinquency. — *People ex rel. State Board of Harbor Commissioners v. La Rue*, 75.
2. **REMOVAL OF WHARFINGER — CHANGE OF STATUTE.** — The fact that the wharfinger was appointed in 1880, and removed from office in 1883, after the delinquency complained of had taken place, and that the action was commenced after a change was made in the statute, whereby the duties of the wharfinger were conferred upon another officer, called a collector, is no objection to the maintenance of the action by the harbor commissioners against the sureties of the wharfinger for money which had become due from the wharfinger before his removal from office and before the change in the law. — *Id.*

HIGHWAYS. See STREETS, ROADS, AND HIGHWAYS.

HOME FOR CARE OF INEBRIATES.

1. **RECOVERY OF FINES PAID TO COUNTY TREASURER — MANDAMUS.** — There is no law which specially enjoins it as a duty of the treasurer of the city and county of San Francisco, resulting from an office, trust, or station, to pay to the Home for the Care of the Inebriates of San Francisco the amount of any fines collected by the police courts and turned over to him, and *mandamus* will not lie to compel him to pay over to the Home the amount of any fines so collected, although the clerk of the police judge's court may have turned over to the treasurer the moneys which he is enjoined by the act of March 17, 1876, to pay directly to the officers of the Home. — *Home for the Care of the Inebriates v. Reis*, 142.
2. **PAYMENT OF FINES FOR DRUNKENNESS — REPEAL OF STATUTE.** — The act of March 17, 1876 (Stats. 1875-76, p. 325), providing that the fines and forfeitures, not exceeding eight hundred dollars in the aggregate in any one month, imposed and collected by the police judge's court in San Francisco for drunkenness, shall be paid by the clerk of such court to the Home for the Care of Inebriates, was not repealed by the act of March 5, 1889 (Stats. 1889, p. 62), reorganising the police court, and providing that all fines and forfeitures imposed by such court should be paid into the treasury of the city by the clerk of each department once a week, and repealing all inconsistent acts and parts of acts, but containing no special reference to the act of March 17, 1876. — *Id.*
3. **REPEALS BY IMPLICATION — SPECIAL STATUTE WHEN NOT REPEALED BY GENERAL LAW — REPEAL OF INCONSISTENT ACTS.** — Repeals by implication are not favored, and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals

HOME FOR CARE OF INEBRIATES (Continued).

the other, when it does not, in terms, purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect, by language showing that the attention of the legislature was called to the special act, and that the general act was intended to embrace the special cases; and the mere fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of the rule. — *Id.*

HOMESTEAD.

1. SEPARATE PROPERTY OF HUSBAND — ENTRY OF HOMESTEAD CLAIM — PATENT — RELATION TO EQUITABLE INTEREST. — A husband who, before his marriage, makes proper application to enter land as a homestead under the laws of the United States acquires an equitable interest in the land which is his separate property, although he has not, at the time of his marriage, fully completed the term for which he was to reside upon and cultivate it, so as to entitle him to receive a patent therefor from the United States, and the legal title afterwards acquired by the patent relates back to the equitable interest, and is also his separate property; and a homestead filed thereon by the wife alone is not a selection from community property, under section 1474 of the Code of Civil Procedure. — *Estate of Lamb*, 397.
2. ABANDONMENT OF HOMESTEAD — UNRECORDED AGREEMENT FOR DIVISION. — A homestead selected by a wife upon the separate property of the husband is not abandoned by a subsequent agreement of the spouses for its division between them, which is not recorded by either of the parties. — *Id.*
3. DEEDS BETWEEN HUSBAND AND WIFE SUBJECT TO HOMESTEAD. — Where a wife has filed a homestead upon separate property of the husband, a deed of the land, subsequently executed by the husband to the wife, operates to vest the legal title thereto in the wife as her separate property, but does not constitute an abandonment of the homestead; and a deed of part of the land by the wife to the husband, in pursuance of an agreement for their separation, and a division of the property, simply reinvests him with the title to the land so conveyed, and a deed to her by the husband of the remainder of such land operates merely as a confirmation or further assurance of title to the land which it purports to convey, all of the land still being subject to the homestead. — *Id.*
4. WIFE'S SELECTION OF HOMESTEAD UPON SEPARATE PROPERTY OF HUSBAND — EFFECT OF DEED FROM HUSBAND — TITLE OF HEIRS. — Where a wife has filed a declaration of homestead upon the separate property of her husband, the subsequent acquisition by her of part of such property as her separate property does not have the effect to change the prior declaration into a selection by her of a homestead from her separate property; and upon the death of the wife, the property so conveyed to her is to be treated as if the homestead thereon had been selected without her consent, and as vesting in her heirs, subject to the power of the superior court to assign it for a limited period to the family of the deceased. — *Id.*
5. PROBATE HOMESTEAD — OBJECT OF CODE PROVISION. — The object of

HOMESTEAD (Continued).

section 1474 of the Code of Civil Procedure, concerning probate homesteads, is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use. — *Id.*

6. "FAMILY" — CONSTRUCTION OF CODE. — Although the word "family," in its ordinary signification, refers to two or more persons, and as used in section 1474 of the Code of Civil Procedure, concerning probate homesteads, will include those living under the same roof as kindred or dependents, and under one head, thus constituting a family, as that term is generally used, yet the word, as used in that section, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member, and a surviving husband of a deceased wife, who had no other family, and who selected a homestead, constitutes the "family of the decedent" within the meaning of that section. — *Id.*

7. RIGHT TO PROBATE HOMESTEAD — DISCRETION. — The right of a surviving husband to an order assigning to him, as "the family of the decedent," a probate homestead for a limited period, under the provisions of section 1474 of the Code of Civil Procedure, is not an absolute right, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it. — *Id.*

HUSBAND AND WIFE. See **COMMUNITY PROPERTY; DIVORCE; HOMESTEAD.**

INFANTS. See **PARENT AND CHILD.**

INJUNCTION. See **CONTRACTS, 2; STREETS, ROADS, AND HIGHWAYS, 12.**

INSOLVENCY.

1. DISCHARGE OF INSOLVENT — DEBT CREATED BY FRAUD. — The fact that a particular debt of an insolvent debtor was created by fraud is no ground for refusing a discharge from other debts. — *Stiegel v. His Creditors*, 409.
2. BOOKS OF ACCOUNT — CONSTRUCTION OF INSOLVENT ACT. — The purpose of section 49 of the Insolvent Act, providing that a final discharge in insolvency may be refused when the debtor has not kept proper books of account, is to require every merchant or tradesman to so keep his books that any competent person, by an examination of them, can ascertain and determine the real condition of his affairs; and if they are so kept, though imperfect, inartistic, and inaccurate in unimportant particulars, they will be treated as proper books of account, within such section. — *Id.*
3. ACCOUNTS OF OUTSIDE MATTERS — PROPRIETY OF BOOKS. — Though a trader should be held to the utmost good faith and reasonable care in keeping accounts of his business as such, yet he is not required to enter in his books accounts of outside matters; and the question whether his books were "proper" or not is one to be determined in each particular case by the facts and circumstances there shown. — *Id.*

INSOLVENCY (Continued).

4. ACCOUNTS OF MONEY BORROWED — REPAYMENT — DISCHARGE OF INSOLVENT. — A discharge in insolvency should not be denied on the ground that the debtor failed to keep proper books of account, where the only fault found with the books is, that he did not keep in them, in the name of one of his creditors, an account of certain small sums of money borrowed from him, from time to time, during a period of eighteen months, and it does not appear that there ever were any other business transactions between the parties, and the small loans were paid back within two days, and the payments entered in the bank-book kept by the debtor in his books. — *Id.*

See CORPORATIONS, 2, 20.

INSTRUCTIONS.

CLAIM AND DELIVERY — STATUTE OF FRAUDS — CHANGE OF POSSESSION — CONSTRUCTIVE POSSESSION — REVIEW UPON APPEAL. — In an action to recover the possession of personal property, involving a question as to actual and continued change of possession, under the statute of frauds, where it is claimed by the defendant upon appeal that the instructions for plaintiff tended to mislead the jury to infer that merely constructive possession of the property was sufficient to uphold a transfer of the property to the plaintiff, as against an attaching creditor, the jury could not be misled, where the instructions, taken together as a whole, preclude such inference, and where it appears that even if the instructions objected to were not sufficiently definite as to the nature of the possession required, those given at the request of the defendant supplied the defect, and were not inconsistent therewith. — *Doty v. O'Neil*, 244.

See CRIMINAL LAW, 12, 14, 15, 19, 21, 24; NEW TRIAL, 2.

JUDGMENT.

- 1. FORMER ADJUDICATION — ACTION UPON DIFFERENT DEMAND — DEFENSE NOT CONCLUDED — EVIDENCE OF DIFFERENT DEFENSE.** — Although a judgment upon the merits is a conclusive determination respecting the plaintiff's right of action, and respecting all matters directly in issue in the action, and which might have been litigated in respect to the plaintiff's demand, yet the judgment, as an estoppel, is limited to the right of the plaintiff to maintain the action in which it was rendered, and a judgment for the defendant does not estop him, in another action upon a different demand, either as to the defense which was pleaded in the former action, or as to any other defense which might have been interposed therein, or from showing that the evidence, which established an affirmative defense which defeated the former action, was sufficient also to establish a different fact, which becomes material to a defense to any other demand by the same plaintiff. — *Lillis v. Emigrant Ditch Co.*, 558.
- 2. JUDGMENT NOT CONCLUSIVE AS TO COLLATERAL MATTERS.** — A judgment only concludes the parties as to facts in issue, as distinguished from facts in controversy, and is not conclusive of any matter which only comes collaterally in issue, nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment; nor of any collateral facts which are offered in evidence to establish matters or facts in issue. — *Id.*

JUDGMENT (Continued).

3. ACTION FOR DIVERSION OF WATER — DEFENSE OF PRESCRIPTIVE RIGHT — EFFECT OF JUDGMENT — ADMISSION OF ANSWER — EXTENT OF RIGHT.

— In an action for the diversion of water, where the real issue before the court is as to the right of the defendant to divert the water, the diversion of which is complained of, although the defendant pleaded as a defense a prescriptive right to divert a certain amount of water, with respect to which he asked an affirmative relief, the amount of the diversion to which the prescriptive right extends is not a material issue, and is not conclusively determined by a judgment in favor of the defendant, although the findings state such amount, in accordance with the answer, and does not preclude him from defending a subsequent action complaining of a greater diversion, by proof of a greater prescriptive right. The answer in the former action has only the effect, in the subsequent action, of an inconclusive admission of the fact stated as to the extent of the prescriptive right. — *Id.*

4. FINDINGS OUTSIDE OF ISSUES IN FORMER ACTION — EVIDENCE — FAILURE TO FIND. — Findings outside of the issues in the former action, as to the extent of the prescriptive right, not entering into the judgment, could have no effect in that action, and cannot have any greater effect in a subsequent action than would any other declaration of the judge who tried the former action, and cannot have the effect, as evidence in the subsequent action, to require a finding to be made upon an issue upon which there is no other evidence in support of the claim made. — *Id.***5. DIVERSION OF WATER — EVIDENCE — WASTE OF WATER.** — The complaint having erred that the court had decided in the former action that the defendants had the legal right to divert water enough to fill their ditch, evidence that after the diversion of the water by means of the ditch a portion of it was turned back into the stream by a waste-way is properly excluded. — *Id.***6. PLEADING — EFFECT OF FORMER JUDGMENT — EVIDENCE CONTRARY TO ADMISSION.** — An averment in the complaint that the court had decided certain facts in the former action carries with it the admission that the decision was sustained by sufficient evidence to support it, and precludes evidence for the plaintiff to prove the contrary; nor is the effect of such admission qualified or controlled by an averment in the complaint of the contrary fact sought to be proved. — *Id.***7. JUDGMENT UPON PLEADINGS — ADMISSION OF ALLEGATIONS OF ANSWER.** — An allegation of an answer upon a material issue raised by the pleadings is admitted by a motion of the plaintiff for judgment upon the pleadings. — *People ex rel. Atkinson v. Johnson*, 471.**8. DISMISSAL — FAILURE TO ENTER JUDGMENT — DISCRETION — REVIEW UPON APPEAL.** — Where it appears that the contestant of a will had paid the clerk the requisite fee for the entry of any judgment that might be recovered in his favor, and that upon the date of the verdict a judgment was signed in accordance with the verdict, which the clerk was requested to enter, and which the contestant believed was entered, until after service of a notice of motion to dismiss the cause for failure to have the judgment entered within six months after the verdict, the

JUDGMENT (Continued).

discretion of the court below in refusing to dismiss the cause upon that ground will not be disturbed upon appeal. — *Estate of McDevitt*, 17.

9. ASSUMPSIT AGAINST FOREIGN CORPORATION — ATTACHMENT — JUDGMENT IN REM — JURISDICTION. — In an action of assumpsit against a foreign corporation which has no managing agent or other officer in this state upon whom service of summons can be made, the only valid judgment which can be rendered is one in the nature of a judgment *in rem* against such property as was seized under a writ of attachment therein. The fact that a judgment in such action is general in its terms for the recovery of money only, and makes no reference to the fact that any property has been attached therein, does not render it void, if in fact such attachment was made; but if no property was attached in the action, the court is without jurisdiction to render any judgment which can be enforced against the property of the defendant. — *Blanco v. Paymaster Mfn. Co.*, 524.

10. RETURN UPON ATTACHMENT — INCONCLUSIVENESS — SUBSEQUENT ACTION AGAINST SUCCESSOR OF CORPORATION. — The return upon the writ of attachment is not conclusive of the validity of the attachment in a subsequent action against the successor of the corporation defendant. — *Id.*

See **APPEAL**; **CORPORATIONS**, 1-4, 13, 14, 20, 21; **DEEDS**, 17; **EXECUTION**; **FINDINGS**; **MECHANIC'S LIEN**; **MORTGAGE**, 1; **PARTIES**; **PLEADING**; **PRACTICE**, 5, 7, 9, 10, 13-15, 20.

JUDICIAL NOTICE. See **EVIDENCE**.

JURISDICTION. See **SUPREME COURT**; **TAXATION**.

JURY AND JURORS.

1. CRIMINAL LAW — CHALLENGE TO PANEL — SECOND VENIRE — CHALLENGE TO JURORS RESUMMONED. — The fact that some of the jurors summoned in a criminal case upon a second special *venire* had also been summoned upon the first special *venire*, to which a challenge to the entire panel had been sustained by the court, upon the ground of the bias and prejudice of the deputy sheriff who summoned them, furnishes no ground to a challenge of the entire panel of the second *venire*. Whatever objections might be had to the second panel should be presented as challenges to individual jurors. — *People v. Vincent*, 425.

2. POWER OF COURT TO DIRECT SUMMONS OF JURORS. — Under section 226 of the Code of Civil Procedure, the court may at any time direct the sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury-box; and when from any cause there are no regular jurors to be drawn from, the court may exercise the power granted by said section. — *Id.*

See **NEW TRIAL**, 5.

LANDS. See **PUBLIC LANDS**.

LARCENY. See **CRIMINAL LAW**, 11-16.

LEASE. See **DEEDS**, 15-18; **GROWING CROPS**; **GUARANTEE**.

LIEN. See **MECHANIC'S LIEN**; **MORTGAGE**.

MANDAMUS.

MANDAMUS IN DISCRETION OF COURT — VIOLATION OF SPIRIT AND PURPOSE OF LAW. — The writ of *mandamus* is not wholly a writ of right, but lies to a considerable extent within the sound discretion of the court where the application is made, and should not issue to compel a technical compliance with the letter of the law, in violation of its plain intent and spirit, nor to wrest a statute from its true purpose. — *Wiedswaid v. Dodson*, 450.

See **APPEAL, 4**; **HOME FOR CARE OF INEBRIATES**; **MUNICIPAL CORPORATIONS**.

MARRIAGE. See **DIVORCE**.

MEASURE OF DAMAGES. See **DAMAGES**.

MECHANIC'S LIEN.

1. JUDGMENT OF FORECLOSURE — NECESSITY OF LAND FOR USE OF BUILDING.

— A judgment, in an action to foreclose a mechanic's lien, need not adjudicate that the land directed to be sold is all necessary for the convenient use and occupation of the building, where the complaint alleges that all of the land is necessary for such purpose, and the court finds the allegation to be true. — *Dusy v. Prudom*, 646.

2. ADJUDICATION OF OWNERSHIP OF LAND — NOTICE TO OWNER — SUBJECTION TO LIEN. — The failure of the judgment in such action to adjudicate that at the commencement of the action the land belonged to the person who caused the building to be constructed, or that it was erected with his knowledge, does not render the judgment erroneous, where it is alleged and found that the defendant at whose instance the building was erected was at all times mentioned the owner and entitled to the possession of the property, and that the interests of the other defendants who claimed to have some interest therein were subsequent to the plaintiff's lien. — *Id.*

3. JUDGMENT OF FORECLOSURE — EXTENT OF LAND DECREED TO BE SOLD

— PRESUMPTION UPON APPEAL — PLEADING — NECESSITY FOR CONVENIENT USE. — In an action to foreclose a mechanic's lien, where there is nothing in the record to show that the land described in the decree in favor of the plaintiff directing the land to be sold is greater in extent than that covered by the building, it will be presumed upon appeal in favor of the judgment that it was not greater in extent, and the judgment will not be reversed because of the absence of an allegation and finding that it was necessary for the convenient use and occupation of the building. — *Sachse v. Auburn*, 650.

MISTAKE. See **TRUST, 4**.

MORTGAGE.

1. FORECLOSURE OF MORTGAGE — DEFAULT JUDGMENT AGAINST SUBSEQUENT PURCHASER — INSUFFICIENT PLEADING — VALIDITY OF JUDGMENT — LIMITATION OF ATTACK — STRIKING OUT. — In an action for the fore-

MORTGAGE (Continued).

closure of a mortgage against the mortgagor and a subsequent purchaser of the mortgaged property, where the prayer of the complaint was for a foreclosure of the mortgage and a sale of the property, and that the proceeds be applied to the payment of the money due thereunder and for costs, and asked for a deficiency judgment, and the summons followed the prayer of the complaint, and gave notice that the action was brought to obtain a decree of foreclosure of the mortgage and for a sale of the premises, and if the proceeds of the sale were insufficient, to obtain a judgment against the defendants for the balance due, and that upon their default the plaintiff would apply to the court for the relief demanded, and the action was dismissed as to the mortgagor, and a default judgment rendered against the subsequent purchaser for the amount due under the mortgage, such judgment is not void, although the complaint did not state facts showing any personal liability upon the part of the subsequent purchaser; but the error is one which should have been corrected upon appeal, or upon a proper showing by motion made within the time limited by section 473 of the Code of Civil Procedure, and cannot be stricken out after the lapse of the time. — *Blondeau vs. Snyder*, 521.

2. FORECLOSURE OF MORTGAGE — APPEAL — BOND FOR DEFICIENCY. — Where a decree foreclosing a mortgage includes a deficiency judgment, its execution cannot be stayed, in favor of any appellant, unless he gives an undertaking on appeal to provide for the payment of such deficiency, although he may not be the mortgagor, and there is no deficiency judgment against him, and regardless of whether he is in possession or not. *Spence v. Scott*, 152.

See APPEAL, 6; ARBITRATION; CONTRACT, 2; RECEIVER; STATUTE OF LIMITATIONS, 1-4; TRUST, 6.

MUNICIPAL CORPORATIONS.

CHANGE OF BOUNDARIES — CONSTRUCTION OF STATUTE — UNREASONABLE EXCLUSION OF TERRITORY — SPECIAL ELECTION — MANDAMUS. — The act of March 19, 1889 (Stats. 1889, p. 356), providing for the changing of the boundaries of cities and municipal corporations, and the exclusion of territory therefrom, was intended to provide for an ordinary reasonable change of the boundaries of a city, and not a means by which a city might be practically disincorporated; and where it appears, in a proceeding thereunder, that the extent and proportion of the population sought to be excluded from a city would leave less than one half the population necessary to form a municipal corporation, the right of an elector and property owner to a writ of mandate to compel the trustees of the city to call a special election, for the purpose of submitting the question of the exclusion of the territory to the electors, will be denied. — *Wiedswald v. Dodson*, 450.

See STREETS, ROADS, AND HIGHWAYS, 12-14; TAXATION, 4; WATER AND WATER RIGHTS, 1.

MURDER AND MANSLAUGHTER. See CRIMINAL LAW, 2, 10.

NEGLIGENCE.

1. **FALLING OF ELEVATOR — EVIDENCE — INSTRUCTIONS FROM BUILDERS OF ELEVATOR TO OWNERS.** — In an action for injuries caused by the falling of an elevator, where the main issue is whether the defendants had been negligent in the mode in which they had run the elevator at the time of the accident, testimony as to directions given to one of the defendants, from those who put the elevator in the building, as to how the elevator should be handled or used, and as to what the effect would be if he did not carry out those instructions, is relevant, material, and competent upon the issue of negligence. — *Smith v. Whittier*, 279.
2. **NEGLIGENCE RELATIVE TO CIRCUMSTANCES — SITUATION AND KNOWLEDGE OF PARTIES.** — Negligence is opposed to diligence or carefulness, and is never absolute or intrinsic, but is always relative to some circumstance of time, place, or person, and is to be determined by reference to the situation and knowledge of the parties, and all the attendant circumstances; and what would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances. — *Id.*
3. **KNOWLEDGE OF FACTS SHOWING DUTY — CARE IN CONTROL OF SUPERIOR FORCE.** — Negligence being the violation or disregard of some duty or obligation which one owes to another, a knowledge of the facts out of which the duty springs is an essential element in determining whether there has been any negligence; and the amount of care requisite to be exercised in the use of a mechanical or natural agency, whose superior force demands skill in its management to prevent its getting beyond ordinary control, depends upon the extent to which the knowledge goes. — *Id.*
4. **EVIDENCE OF NOTICE — TESTIMONY OF DEFENDANT — CROSS-EXAMINATION OF INFORMANT — HEARSAY.** — Whenever the knowledge of a defendant charged with negligence is a factor in determining the question of negligence, it may be shown by his own testimony that he received notice of facts which would constitute negligence, and it is no objection that the notice was not given under the sanction of an oath, or that the opposite party had no opportunity of cross-examining the informant, and proof of such notice is not within the rule excluding hearsay. — *Id.*
5. **EXCESSIVE DAMAGES — NEW TRIAL.** — Where the amount of damages given in an action for damages for negligence are obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict will be set aside as excessive. — *Morgan v. Southern Pacific Co.*, 510.
6. **ACTION FOR DEATH — MEASURE OF DAMAGES — PECUNIARY LOSS — SORROW AND MENTAL ANGUISH — LOSS OF SOCIETY.** — In an action to recover damages for the death of a relative, caused by negligence, the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative. Sorrow and mental anguish caused by the death are not elements of damage in such a case, and nothing can be recovered as a *solatium* for wounded feelings; and the loss of society can only be considered for the purpose of estimating the pecuniary loss. — *Id.*

NEGLIGENCE (Continued).

7. **DEATH OF MINOR CHILD — ACTION BY MOTHER — EXCESSIVE DAMAGES — PLEADING — PROOF.** — A verdict for twenty thousand dollars for the death of an infant child, given in an action by the mother to recover damages for its death, alleged to have been caused by the negligence of the defendant, will be set aside as excessive, especially where there was no averment in the complaint of any special damage, and there was no evidence whatever introduced or offered upon the subject of damage. — *Id.*
8. **VALUE OF SERVICES — PECUNIARY INJURY TO PARENT.** — In an action by a parent to recover damages for the death of a minor child, caused by the negligence of the defendant, the main element of damage is the probable value of the services of the deceased until its majority, considering the cost of its support and maintenance during the early and helpless part of its life; and a charge to the jury that they were not limited by the actual pecuniary injury sustained by the parent by reason of the death of the child is error. — *Id.*
9. **PLEADING — LOSS OF SERVICES — SPECIAL DAMAGE.** — The loss of the services of the deceased child is not special damage necessary to be averred, but is a natural and necessary sequence of the death. — *Id.*
10. **BACKING OF TRAIN AT STATION — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.** — In an action for personal injuries caused by the alleged negligence of the engineer of a passenger train in backing the train after stopping at a station, while the plaintiff was alighting from the train, where the evidence is conflicting as to the period of time between the stop and the movement backwards, the question of contributory negligence of the plaintiff in leaving her seat in the car before the train stopped is fairly within the province of the jury to decide. — *Morgan v. Southern Pacific Co.*, 501.
11. **RECOMPENSE FOR PAIN — COMPENSATORY DAMAGE — INACCURATE INSTRUCTION — HARMLESS ERROR.** — In such action, an instruction to the jury that "money is an inadequate recompense for pain," though not an appropriate expression in a charge to the jury upon the question of compensatory damage, does not constitute a reversible error, where the jury are also instructed that resulting pain is an element of damage to be compensated, and that if the plaintiff was entitled to recover, "the measure of her recovery is what is called compensatory damages, — that is, such sum as will compensate her for the injury she has sustained"; that "the determination of the amount is committed to the judgment and sound discretion of the jury"; and that it should be "in such measure as a jury, dispassionately considering all the circumstances of the case, will allow." — *Id.*
12. **EXCESSIVE DAMAGES.** — A verdict will not be disturbed because excessive, unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury. — *Id.*
13. **EARNINGS OF PLAINTIFF.** — The rule that damages recoverable for injuries received because of the negligence of a defendant should not exceed an amount upon which the legal interest would equal the value of the injured party's past earnings and probable future earnings does not apply to a case where the cause of action is the plaintiff's own per-

NEGLIGENCE (Continued).

sonal injury, but is applied only to cases where suit is brought for the death of a relative. — *Id.*

14. **VERDICT NOT EXCESSIVE — CONFLICTING EVIDENCE.** — A verdict for fifteen thousand dollars for personal injuries received through the negligence of a railroad company held not excessive under the circumstances of this case, there being evidence tending to show a permanent injury, accompanied with continual suffering and disability, which the jury would be warranted in believing, notwithstanding conflicting evidence as to the extent of the injury. — *Id.*

See STATUTE OF LIMITATIONS, § 9.

NEW TRIAL.

1. **NEW TRIAL STATEMENT — SPECIFICATIONS — REVIEW UPON APPEAL.** — Where there is no specification of error in a statement on motion for new trial, errors alleged by the appellant to have been committed by the court during the trial will not be considered by the appellate court. — *Bohnert v. Bohnert*, 444.
2. **STATEMENT — SPECIFICATIONS OF ERROR — INSTRUCTIONS.** — A general specification in a statement on motion for a new trial, "that the court erred in giving to the jury instructions asked by plaintiff," is insufficient. — *Joyce v. White*, 286.
3. **STATEMENT — AMENDMENT — APPEAL — POWER OF SUPREME COURT.** — The supreme court has no power to correct a statement upon motion for a new trial upon affidavits showing an error therein. — *Santa Barbara v. Eldred*, 378.
4. **TIME FOR SERVICE OF NOTICE — NOTICE OF DECISION — NOTICE OF MOTION BY SUCCESSFUL PARTY.** — A notice of intention to move for a new trial, by the party in whose favor judgment has been rendered, served upon the adverse party, which contains the title of the cause, and which states that "a motion will be made to set aside and vacate the decision and judgment heretofore rendered and entered herein," contains a sufficient notice in writing that a decision of the court had theretofore been rendered to require the adverse party to serve and file his notice of intention for a new trial within ten days thereafter. — *Waddingham v. Tubbs*, 249.
5. **MISCONDUCT OF JURY — COUNTER-AFFIDAVITS — EXCUSABLE NEGLIGENCE — DISCRETION.** — Where one of the grounds of a motion for a new trial is misconduct of the jury, and counter-affidavits directly responsive to the affidavits in support of the motion are prepared, but by inadvertence and excusable neglect are not filed until more than ten days thereafter, it is within the discretion of the court to permit such counter-affidavits to be read, upon a proper showing of excusable neglect. — *Smith v. Whittier*, 279.
6. **TIME FOR COUNTER-AFFIDAVITS NOT JURISDICTIONAL.** — The time within which counter-affidavits on a motion for a new trial may be filed is not jurisdictional, but is only a rule of procedure subject to the equitable control of the court. — *Id.*
7. **NEWLY DISCOVERED EVIDENCE — DISCRETION — REVIEW UPON APPEAL.** — A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its action in

NEW TRIAL (Continued).

refusing the motion will not be disturbed upon appeal, where the appellate court cannot say, upon the record before it, that if a new trial were had, and the newly discovered evidence were produced, the result would be different. — *Omids v. Lanterman*, 869.

8. **QUESTION OF BOUNDARY — CONFLICTING EVIDENCE — CONTRADICTING FIELD-NOTES OF SURVEY.** — The refusal of the trial court to grant a new trial upon the ground of newly discovered evidence will not be reversed upon appeal, where it appears that the question at issue was one of boundary of land, upon which the evidence was substantially conflicting, and the newly discovered evidences fixes the location of the stations of a survey on the east side of an arroyo, in contradiction of the field-notes of the survey, which described them as being on the west side of the arroyo, and which were confirmed by other evidence adduced upon the trial, and by counter-affidavits used upon the hearing of the motion. — *Id.*

9. **ORDER DENYING NEW TRIAL — EFFECT OF NUNC PRO TUNC AMENDMENT — RELATION TO DATE OF ORDER — APPEAL.** — A *nunc pro tunc* order of the trial court amending an order denying a new trial after the taking and perfecting of an appeal therefrom, by adding a recital to the effect that the motion for a new trial was based and submitted on a bill of exceptions filed at the date of the hearing of the motion, merely corrects the first order, and takes effect as of the date of the order corrected; and a contention that the last order superseded the first, and is the only order denying a new trial, which should have been appealed from instead of the first order, is untenable. In legal effect there was but one order. — *Combination Land Co. v. Morgan*, 548.

10. **BILL OF EXCEPTIONS — SPECIFICATIONS — INSUFFICIENCY OF EVIDENCE — DECISION AGAINST LAW.** — Where the specifications in a bill of exceptions used on a motion for new trial include a double statement that the evidence is insufficient to justify the decision, and that the decision is against law in the particulars specified, the ambiguity is removed where the particulars stated show that the objection is to the insufficiency of the evidence. — *Id.*

See **APPEAL**, 10, 14; **ESTATES OF DECEASED PERSONS**, 5; **NEGLIGENCE**, 5.

NOTICE. See **BONA FIDE PURCHASER**.

NOVATION. See **EVIDENCE**, 9.

NUISANCE. See **CONSIDERATION**.

PARENT AND CHILD.

CUSTODY OF CHILD BY UNCLE AND AUNT — HABEAS CORPUS — RIGHT OF MOTHER — CHOICE OF CHILD. — Upon the hearing of a writ of *habeas corpus* sued out by the mother of a child to recover its custody from its uncle, who had been appointed as its guardian by the superior court, although it may appear that the order appointing the guardian was void for want of jurisdiction, yet where the mother voluntarily relinquished the care of the child when she was scarcely a year old, and ever since she was two years of age left her in the exclusive charge and control of her

PARENT AND CHILD (Continued).

uncle and aunt, the mother seeing the child but twice in nearly nine years, and the child's material interests will be promoted by leaving her with the uncle and aunt, with whom the child herself chooses to remain, no coercive order will be made by the court by which the mere legal right of the mother to the custody of the child may be enforced against the child's manifest inclination and reasonable choice to remain with her uncle and aunt, but the child will be left free to go to the home of her choice. — *Matter of Gates*, 461.

See DIVORCE, 16-21; NEGLIGENCE, 6-9.

PARTIES.

FRAUDULENT GRANTOR PROPER BUT NOT NECESSARY PARTY. — While a fraudulent grantor is a proper party defendant in an action to subject to a lien of a judgment the property alleged to have been fraudulently conveyed, he is not a necessary party. — *Blanc v. Paymaster Mining Co.*, 524.

See CORPORATIONS, 2, 4, 6, 9, 11; GUARDIAN AND WARD; PARTNERSHIP, 9, 10; PLEADING.

PARTITION.

1. SEPARATE ACTION FOR DIVISION OF PERSONAL PROPERTY VOID — ORDER OF JOINT SALE — EXPENSE OF RECEIVER. — Where real estate and personal property thereon respectively are owned by different parties, and are considered and disposed of by the court in two separate and independent actions, one of them being for a partition of the real estate, and the other for a sale of the personal property and a division of the proceeds, the court has no power, in the action for partition of the real estate, to link the two properties together in an order for a joint sale, or by such order to render the owners of the personal property answerable for any part of the expense incurred by a receiver in preserving the real estate, and such order of sale is wholly void. — *Woodward v. Superior Court*, 272.

2. ORDER OF SALE VOID UPON ITS FACE — PROHIBITION NOT ALLOWED. — Where the invalidity of an order of sale of property appears upon its face, a purchaser of the property takes no title, and the owners of the property are therefore not injured by a sale so as to warrant the issuance of a writ of prohibition to restrain it. — *Id.*

3. RECEIVER IN PARTITION — JURISDICTION — ERROR OF LAW — QUERY. — Whether the superior court has power to appoint a receiver in an action for partition, in the absence of facts of an equitable nature, superadded to the facts justifying partition, or whether the absence of such facts does not affect its jurisdiction to appoint a receiver, discussed but not decided. — *Id.*

PARTNERSHIP.

1. DEALING IN LANDS — STATUTE OF FRAUDS — ORAL AGREEMENT — EVIDENCE. — A partnership may be formed for the purpose of dealing in lands, by buying and selling lands generally, or it may be limited to a speculation upon a single venture; and like any other contract of partnership, it is an agreement to share in the profit and loss of certain busi-

PARTNERSHIP (Continued).

ness transactions, and does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands, other than a pecuniary interest, and need not be in writing under the statute of frauds, but may be formed by oral agreement and proved by parol evidence. — *Bates v. Babcock*, 479.

2. ACQUISITION OF LANDS BY PARTNERSHIP — EQUITABLE RIGHTS OF PARTNERS — Though such partnership agreement does not of itself create any interest or estate in land, and a bill for the conveyance of lands could not be maintained thereunder, yet by the subsequent acts of the parties, rights are acquired in reference to land purchased in pursuance of the agreement which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud, by raising an equity superior to the legal title, and controlling the legal title in subordination thereto. — *Id.*
3. INTEREST IN LANDS — TRUST RESULTING BY OPERATION OF LAW — PAROL EVIDENCE OF PARTNERSHIP. — If a partnership is proved between the parties upon sufficient evidence, they would have an interest in the lands acquired which forms a portion of the assets of the partnership by reason of a trust resulting by operation of law as an incident to such partnership, but that fact would not constitute a reason for excluding parol evidence to establish the existence of the partnership. — *Id.*
4. PARTNERSHIP ASSETS — LANDS TREATED AS PERSONALTY. — Lands acquired by a partnership for partnership uses constitute partnership assets, and will be treated in equity as personalty, whether the partnership was formed by oral or written agreement; and the same principle applies when the object of the partnership is to deal in lands which are purchased with partnership assets. — *Id.*
5. SETTLEMENT OF PARTNERSHIP — CONVERSION OF ASSETS INTO MONEY — SOURCE OF TITLE — A court of equity, in the settlement of partnership accounts and the conversion into money of partnership assets, whether real or personal, and their division among the partners, never inquires into the source of title of such assets, or in whose name they are held. — *Id.*
6. DIVISION OF PROCEEDS OF SALE OF LANDS — STATUTE OF FRAUDS NO DEFENSE. — In an action for division of the proceeds after a sale of lands under an oral partnership agreement to deal in lands, the statute of frauds is not allowed as a defense thereto; and the same principles which apply to such an action are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale and distribution of proceeds among the partners by a court of equity. — *Id.*
7. FARMING AND THRASHING BUSINESS — SHARING NET PROFITS AS COMPENSATION. — In order to constitute a partnership in the farming and thrashing business, there must be an agreement to carry on the business together and divide the profits, and the fact that one of the agreeing parties is to receive one half of the net profits of the business will not make him a partner therein, if it is agreed that he is to receive the same only as compensation for the use of personal property let by him to be used by the other party in the prosecution of such business in his own name, and solely on his own account. — *Vanderhurst, Sanborn & Co. v. De Witt*, 57.

PARTNERSHIP (Continued).

- 8. EVIDENCE OF PARTNERSHIP — DECLARATION OF COPARTNER.** — Upon the trial of an issue joined as to the fact of partnership, the declaration of an alleged partner, made in the absence of the party denying the partnership, cannot, as against the absent one, be used to establish the fact of partnership. — *Id.*
- 9. ACTION FOR ACCOUNTING AND SETTLEMENT — ASSIGNMENT OF INTEREST — ASSIGNOR A NECESSARY PARTY.** — In an action for an accounting and settlement of a partnership, where it appears that the defendant was in partnership with the plaintiff's assignor and another person, all of whom were jointly interested in the profits of the partnership, and it also appears that no settlement of the partnership matters had ever been made between the original partners, all of them are necessary parties to the action; and a demurrer to the complaint for defect of parties, in that the partner who was plaintiff's assignor, and who was not joined, was a necessary party to the complete determination of the controversy, is properly sustained. — *Ouyamaca Granite Co. v. Pacific Paving Co.*, 252.
- 10. PLEADING — PARTNERSHIP IN CONTRACTS FOR STREET WORK — COLLECTIONS TO BE MADE BY COPARTNER — INSUFFICIENT COMPLAINT.** — When the complaint in such action alleges that the defendant agreed with the plaintiff's assignor and another person to do certain street work with them as partners, and that the defendant should appoint a book-keeper who should keep all accounts, pay all bills, and collect all moneys belonging to the copartnership, and that the profits arising from the work should be equally divided, and which alleges that the work has been performed, and that a large sum of money is still uncollected, but which does not aver that the defendant failed to perform any of the conditions of the agreement to be performed by the defendant, or that the defendant was neglecting or refusing to collect the unpaid money, or was insolvent or likely to become so, or unable or unwilling to respond to any just claim or demand against the defendant, or that there was any danger that the money, when collected by the defendant, would be misappropriated, squandered, or lost, fails to state a cause of action. — *Id.*
- See PLEADING, 5, 10.

PATENT. See PUBLIC LANDS.

PAYMENT. See BONA FIDE PURCHASER.

PERFORMANCE. See CONTRACTS; VENDOR AND VENDEE.

PERJURY. See CRIMINAL LAW, 2-4.

PLACE OF TRIAL.

- 1. CHANGE OF PLACE OF TRIAL—AFFIDAVIT OF MERITS—DEFECTIVE TITLE OF COURT.** — An affidavit of merits, upon a motion for a change of venue made by a defendant, is not insufficient because of the omission of the names of the defendants from the title of the action, where the notice of motion states that the motion will be made "upon the affidavit and demand of defendant to change the place of trial, annexed and served with said notice, and upon said notice and all the papers and pleadings on file in said action," and both the notice and demand were duly en-

PLACE OF TRIAL (Continued).

titled in the action, and the affidavit was filed with the notice. — *West v. Bradley*, 415.

2. SUFFICIENCY OF AFFIDAVIT — BELIEF OF ADVICE OF COUNSEL. — An affidavit of merits upon a motion for a change of venue, which alleges that the affiant fully and fairly stated all the facts relating to the action to his counsel, and that he is advised by him that he has a good, substantial, and complete defense on the merits of the action, is not defective because of failing to allege that the affiant believed the advice of his counsel. — *Id.*

3. CHANGE OF VENUE — DISCRETION. — Although the discretion of the trial court in granting or refusing a change of venue in a criminal action is not an arbitrary discretion, yet where its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate court. — *People v. Vincent*, 425.

PLEADING.

1. GENERAL DEMURRER — SUPPORT OF JUDGMENT — SUFFICIENCY OF STATEMENT — CITY ORDINANCES. — The same distinction between insufficient facts and an insufficient statement of facts, which prevails when it is considered whether the complaint supports the judgment, should prevail upon general demurrer; and although city ordinances are not set out *in hæc verba*, or pleaded as authorized by section 459 of the Code of Civil Procedure, their existence alleged in the complaint must be considered as against a general demurrer. — *Amestoy v. Electric Rapid Transit Co.*, 311.

2. GROUNDS OF SPECIAL DEMURRER. — Upon a general demurrer to a complaint, where the facts necessary to constitute a cause of action are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the demurrer will be overruled. — *Id.*

3. SEPARATE RELIEF AGAINST ONE OF SEVERAL DEFENDANTS — PRAYER OF COMPLAINT. — The relief to which the plaintiff is entitled against any one of the defendants is not limited by his prayer for relief against other defendants; but he is entitled to any relief justified by the facts alleged in the complaint, if proved or admitted. — *Tyler v. Mayo*, 160.

4. UNCERTAINTY — CONSTRUCTION. — The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. — *Bates v. Babcock*, 479.

5. ALLEGATION AS TO PARTNERSHIP IN LANDS — DIVISION OF PROFITS — OWNERSHIP OF LAND. — An allegation that defendants agreed upon certain terms to become equal partners with the plaintiff in certain real property, which the complaint elsewhere shows was held by plaintiff upon a dry, naked trust for third parties, and was purchased from the beneficiaries and transferred to another person as trustee for plaintiff and defendants, does not necessarily imply an agreement for a conveyance of the property to the defendants; and taken in connection with the other averments of the complaint, and with an averment immediately following, that they were to share equally all sums received for the prop-

PLEADING (Continued).

- erty, and all profits and losses accruing on account thereof, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land. — *Id.*
6. DIVERSION OF WATER — PARTICIPATION OF PLAINTIFF AS TENANT IN COMMON — PLEADING — DENIAL OF INJURY — ESTOPPEL. — In an action to recover damages for the alleged diversion of water by means of a dam constructed by the defendants, it may be shown as a defense, under the denial of injury to the plaintiff, that the plaintiff participated with the defendants in the maintenance of the dam and diversion of the water, as a tenant in common with the defendants; and it is not necessary specially to plead such fact as an estoppel. — *Churchill v. Baumann*, 541.
7. CONSENT TO INJURY. — One who consents to an act which occasions him loss is not wronged by it. — *Id.*
8. ANSWER — NEW MATTER. — Any matter which does not discharge or avoid a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist, and that material allegations of the complaint are not true, is not new matter such as is required to be specially pleaded. — *Id.*
9. DENIAL BY AFFIRMATIVE ALLEGATIONS — FINDING. — An issue may be taken upon a material allegation of the complaint by an affirmative allegation in the answer inconsistent with it; and a finding of affirmative facts which are inconsistent with an averment which the answer denies is a sufficient finding that the averment is not true. — *Id.*
10. ACTION TO DISSOLVE PARTNERSHIP — AGREEMENT SUPERSADING PARTNERSHIP CONTRACT — AMENDMENT OF ANSWER UPON TRIAL. — In an action for a dissolution and accounting of an alleged partnership, based upon the violation of a written agreement entered into by the defendant with the plaintiff's intestate, where the defendant denied the partnership, and set up as one of his defenses that the alleged agreement had been superseded and annulled by a subsequent written agreement between plaintiff, defendant, and a third party, and upon the trial, after having proved the execution of the subsequent agreement, sought to show by oral testimony that it had been executed upon the consideration and agreement that the first agreement should be canceled, and all claims of plaintiff's intestate against the defendant waived thereunder, but an objection was made to the testimony, upon the ground that it was incompetent, and not responsive to any of the issues raised by the pleadings, which objection was sustained, it is error for the court to refuse to allow the defendant to amend his answer so as to obviate the objection that the evidence was not within the issues. — *Guidery v. Green*, 680.
11. AMENDMENT TO ALLOW PROOF OF DEFENSE — SURPRISE — CONDITION OF AMENDMENT. — The court should allow the defendant to make amendments to his answer, to enable him to prove facts which will constitute a defense to plaintiff's demand; and if by reason of such amendments the court is satisfied that the plaintiff is taken by surprise, and requires further time to prepare to meet the defense, it can continue the case, and impose such terms as will compensate plaintiff for the expense and delay caused thereby. — *Id.*

PLEADING (Continued).

12. DUTY OF COURT — CORRECTION OF DEFECTIVE LANGUAGE — DEFENSE KNOWN TO ADVERSARY. — It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate an objection that the facts which constitute his cause of action or his defense are not embraced within the issue, or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not that it is then for the first time brought to the notice of the adversary, but that by reason of the language of the pleading it is not within the terms of the issue. — *Id.*

13. OPTION FOR SALE OF WHEAT — ACTION FOR BREACH — DEMURRER. — A complaint alleging that the defendant executed a contract with the plaintiffs, setting out a copy of the contract, which acknowledged the receipt of a consideration of one hundred dollars, for which the defendant allowed the agent of the plaintiffs the "privilege" to deliver to the defendant, within thirty days, five hundred tons of S/87 wheat, "at one dollar and eighty cents per cental"; and which further alleges that within thirty days the plaintiffs tendered a delivery of the wheat and demanded payment of the price, which the defendant refused to pay, — states a cause of action for the breach of an alleged conditional agreement to buy the wheat at plaintiffs' option, and is sufficient, as against a general demurrer. — *Berry v. Kowalsky*, 184.

14. CONTRACT PLEADED IN HÆC VERBA — MEANING OF WORDS OR ABBREVIATIONS — EVIDENCE — SPECIAL DEMURRER. — Where a written agreement is set out in full in a pleading, the meaning of words or abbreviations therein may be proved on the trial, for the purpose of enabling the court to interpret the words, and the oral evidence as to their meaning need not be stated in the pleading, nor do abbreviations contained in the contract render the pleading liable to special demurrer. — *Id.*

15. SURPLUSAGE. — Where a complete contract is expressed without abbreviations used therein, they may be disregarded as surplusage, if they are meaningless. — *Id.*

16. DESCRIPTION OF WHEAT — ABBREVIATIONS — SPECIAL DEMURRER. — The words or abbreviations, "S/87 wheat," cannot be said, upon a special demurrer to the pleading, to be unintelligible or meaningless, nor can it be said that their use renders the pleading ambiguous or uncertain. — *Id.*

17. CONSTRUCTION OF PLEADINGS — ISSUES — DENIAL OF OWNERSHIP — FAILURE TO DENY SPECIFIC BOUNDARIES RECITED — PROOF OF BOUNDARIES. — Where the complaint in an action to quiet title, after alleging the plaintiff's ownership of the land as marked on a plat, proceeds by way of recital to state that the land is particularly described according to certain specific metes and bounds, and the answer, without joining special issue as to the boundaries, denies the ownership by the plaintiff of the land described in the complaint, or any part thereof, the fact is not thereby admitted that the land is correctly described by the metes and bounds specified in the complaint, but the plaintiff must prove that fact, and in the absence of any evidence to prove them, a judgment quieting the title to the land described by such specific boundaries will be reversed upon appeal. — *Redd v. Murry*, 48.

PLEADING (Continued).

18. JUSTIFICATION UNDER ATTACHMENT AGAINST PLAINTIFF'S VENDOR --

STATUTE OF FRAUDS -- CHANGE OF POSSESSION -- SUFFICIENCY OF ANSWER -- APPEAL -- OBJECTION FOR FIRST TIME. -- Where the defendant. in an action for the conversion of goods, justified under a writ of attachment against the vendor of the plaintiff under the statute of frauds for want of a sufficient change of possession, and the trial was conducted in the trial court without demurrer to the answer or objection to evidence, upon the assumption of all parties that the plea was sufficient in form, it cannot be objected to for the first time upon appeal. — *Defendorff v. Hopkins*, 843.

19. TWO COUNTS UPON SAME CAUSE OF ACTION -- DEMURRER TO FIRST COUNT -- ERROR WITHOUT PREJUDICE. -- The sustaining of a special demurrer for uncertainty to the first count of a complaint, consisting of the common count for money had and received, the other count, upon which the case was in fact tried, consisting of a claim for over-drafts of defendant's accounts with the plaintiff bank, if erroneous, cannot be prejudicial error, where it appears from the evidence that there could be no recovery upon the first count, and that both counts were intended to represent the same cause of action. — *Consolidated Nat. Bank v. P. C. S. S. Co.*, 1.

See CONSIDERATION, 1; CONTRACTS, 12-15; CORPORATIONS, 1, 2, 6; DEEDS, 11; ESTATES OF DECEASED PERSONS, 4; EXECUTION, 2; JUDGMENT; MECHANIC'S LIEN, 3; NEGLIGENCE, 9; PARTIES; PARTNERSHIP, 10; PRACTICE; STATUTE OF LIMITATIONS, 1; VENDOR AND VENDER, 1, 5; WATER AND WATER RIGHTS, 7-9.

POLICE COURT. See TAXATION, 1, 2.

POSSESSION. See ADVERSE POSSESSION; EJECTMENT; EMINENT DOMAIN; INSTRUCTIONS; RECEIVER; STATUTE OF FRAUDS, 1, 2.

PRACTICE.

1. RULES OF PROCEDURE -- OBJECT AND CONSTRUCTION. -- Rules of procedure, whether statutory or made by the court, are intended to facilitate courts in doing justice between the parties, and when not jurisdictional are intended for the convenience of courts and litigants, and should be liberally construed. — *Smith v. Whittier*, 279.
2. CONTINUANCE -- DISCRETION -- GOOD FAITH OF APPLICATION. -- Applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal unless the record affirmatively shows that it abused its discretion. There is no abuse of discretion in refusing to grant a continuance if the circumstances cast suspicion on the good faith of the application, and induce the belief that it was intended only for delay. — *Barnes v. Barnes*, 171.
3. LIBERALITY OF DISCRETION IN DIVORCE CASES -- NECESSITY OF GOOD FAITH AND DILIGENCE. -- While the trial court should be most liberal in granting continuances in divorce cases, because the public as well as the parties to the action are interested in the result of the suit, a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an

PRACTICE (Continued).

attempt to subordinate the business of the court to his own business engagements and convenience. — *Id.*

4. **REOPENING CASE FOR FURTHER EVIDENCE — DISCRETION.** — The action of the trial court in refusing to reopen an action after the close of the trial, for the purpose of allowing the introduction of additional evidence, is not an abuse of discretion, where there is no showing of any excuse for not having produced the evidence at the trial. — *Consolidated Nat. Bank v. P. O. S. S. Co.*, 1.
5. **DISMISSAL OF ACTION — ORDER OF ATTORNEY FOR PLAINTIFF — JUDGMENT — JURISDICTION — APPEARANCE OF DEFENDANT.** — The filing, by a plaintiff in an action, of a paper stating that the action is thereby dismissed, simply amounts to an order for the dismissal of the action upon which the clerk is authorized to enter a judgment of dismissal, and does not of itself operate as a dismissal of the action; and the court retains jurisdiction of the action until the judgment of dismissal is entered by the clerk; and if no judgment is entered, and the defendant appears and answers after the order for dismissal is filed, the court has jurisdiction to render judgment in the cause for the plaintiff. — *Barnes v. Barnes*, 171.
6. **NONSUIT AFTER SUBMISSION OF CAUSE.** — The court is justified in granting the defendant's motion for a nonsuit, after the evidence on both sides has been heard, where, if the motion had been denied and a verdict found for the plaintiff, it would have been set aside as not supported by but contrary to the evidence. — *Fox v. S. P. Co.*, 234.
7. **EFFECT OF AGREED STATEMENT — RESTRICTION TO FACTS ADMITTED.** — Where a case is submitted under an agreed statement of facts, the consideration of the court is restricted to the facts admitted, and its judgment cannot be based upon any other facts which it may suppose one of the parties can establish. — *Green v. Fresno County*, 329.
8. **NOTICE OF OVERRULING OF DEMURRER — PRESENCE IN COURT — WAIVER OF WRITTEN NOTICE.** — Written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party at the time of the ruling, and the time to amend or answer runs in such case from the time when the ruling is made. — *Wall v. Heald*, 364.
9. **DEFAULT JUDGMENT — AUTHORITY OF CLERK.** — When a demurrer has been overruled and time given to answer, but no answer is filed within the time granted by the court to the defendant in which to answer, the clerk is authorized to enter a default judgment without an order of the court. — *Id.*
10. **VACATING JUDGMENT — EXCUSABLE NEGLECT — ABSENCE FROM TRIAL — NOTICE OF SETTING OF CAUSE — RELIANCE UPON OPPOSING ATTORNEYS.** — It is not an abuse of discretion for the trial court to deny a motion to vacate a judgment rendered in the absence of the parties against whom the judgment is given, on the ground of excusable neglect, where the application to set it aside simply shows that such parties had no notice of the setting of the case for trial; that they relied upon the belief that they were entitled to notice, as they were non-residents of the county; that the rules of court specified no time for the calling of the calendar and the setting of cases; and that the attorney for the applicant wrote to the attorneys for the adverse party, requesting them to inform him as

PRACTICE (Continued).

soon as the cause was set; and that the parties and their attorney believed that the request would be complied with and no advantage taken of their absence. — *Dusy v. Prudom*, 646.

11. DUTY OF PARTIES TO ACTION — NOTICE OF PROCEEDINGS. — Parties to an action and their attorneys, whether residents or non-residents of the county where the action is pending, must watch its progress, and are charged with notice of the fact that it has been set for trial. The parties are bound to know the rules of the trial court, and if the rules fix a day for setting causes for trial, they are presumed to know the fact, and if the rules do not, they must govern themselves accordingly, and learn from the proceedings of the court when the case is to be heard. — *Id.*
12. REASONABLE OPPORTUNITY FOR TRIAL. — Parties will not be forced to trial without a reasonable opportunity to prepare therefor, and the court would abuse its discretion in refusing a continuance or in refusing to set aside a judgment taken because of hasty action in setting a case for trial at an unreasonably early day, whereby a party has been unable to be present or to prepare for trial. — *Id.*
13. JUDGMENT BY DEFAULT — APPLICATION TO VACATE — EXCUSABLE NEGLIGENCE — DISCRETION — APPEAL. — Applications to the trial court to set aside a judgment by default, upon the ground of excusable neglect, are addressed to the sound legal discretion of the trial court, and the order of that court, in granting or denying the motion, will not be disturbed upon appeal, unless an abuse of discretion is shown. — *Williamson v. Cummings Rock Drill Co.*, 652.
14. INSUFFICIENT SHOWING — MISTAKE IN MARKING TIME FOR ANSWER — NUMEROUS ACTIONS. — It cannot be said to be an abuse of discretion for the trial court to refuse to set aside a judgment by default, upon the ground of excusable neglect, where the affidavits merely show that there were several actions between the same parties, and that when the defendant's attorney received the summons and copy of complaint, he marked the papers "Answer due April 23d," whereas it was due the 21st, and the only reason for his not having filed the answer was his mistake in marking the papers, and owing to the fact that there were so many actions against the defendant. — *Id.*
15. PROOF OF SERVICE OF SUMMONS — AFFIDAVIT — IMMATERIAL FACTS — CITIZENSHIP — CERTIFIED COPY. — A judgment by default is not erroneous because the affidavit of service of summons fails to show that the person making the service was a white male citizen of the United States, or that he served a certified copy of the complaint, as neither of these things are necessary. — *Id.*
16. STIPULATION OF ATTORNEYS — CONSTRUCTION OF CODE — WRITTEN AGREEMENT NOT FILED NOR ENTERED UPON MINUTES. — Section 283 of the Code of Civil Procedure, which provides that an attorney can bind his client in an action, by his agreement, "filed with the clerk, or entered upon the minutes of the court, and not otherwise," was not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise, and does not require a construction, that in no instance shall an agreement which the attorney may make in behalf of his client be binding, unless entered in the minutes of the court, or

PRACTICE (Continued).

filed with the clerk. Its provisions refer to executory agreements, and not to those which have been wholly or in part executed. — *Smith v. Whittier*, 279.

17. **STIPULATION ACTED UPON WITHOUT FILING — ESTOPPEL.** — If the attorneys in an action have acted upon a written agreement, to such an extent that it would be inequitable not to recognize its binding effect, the court will not allow the agreement to be repudiated, upon the ground that it has not been filed with the clerk. — *Id.*
18. **EFFECT OF SUBSTITUTION OF ATTORNEYS — CONTINUING FORCE OF STIPULATION.** — The parties to an action cannot be relieved from an obligation created by their attorneys, by the mere fact that another attorney is substituted in the place of the former attorneys who created the obligation. An attorney who is substituted for another in a cause steps into the place of his predecessor, and stands, with reference to the case and to the other party, precisely as did his predecessor, and can repudiate or be relieved from an agreement that had been made by him, only to the same extent and in the same manner as could his predecessor. — *Id.*
19. **STIPULATION AS TO TESTIMONY — CONTINUING CONSENT — DEATH OF WITNESS — IRREVOCABLE AGREEMENT — EFFECT OF SUBSEQUENT FILING.** — The execution of a stipulation between the attorneys of the parties to a cause, that the testimony of a witness taken in another action should be read and used in the trial of the cause in which the stipulation was entered into, is a continuing consent on the part of the attorneys that the stipulation may be filed at any time thereafter, unless they may in some direct and express mode signify their withdrawal of such consent; and the death of the witness before such withdrawal renders the stipulation irrevocable; and the filing of the stipulation thereafter has the effect to operate and become binding upon the parties as from its date. — *Id.*
20. **ORAL STIPULATION — EXTENSION OF TIME TO ANSWER — SETTING ASIDE JUDGMENT BY DEFAULT.** — Although, as a general rule, a stipulation of counsel cannot be enforced unless put in writing, or entered in the minutes of the court, yet where an oral agreement for an extension of time to answer or demur is admitted, and has been relied upon by the defendant, a judgment by default taken against him in violation of the terms of the stipulation should be set aside. — *Johnson v. Sweeney*, 304.
21. **PROOF OF ORAL AGREEMENT — ADMISSION — EXECUTED AGREEMENT — ESTOPPEL.** — If the party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute; but where the facts relied upon by the moving party are not controverted, there is no reason for the application of the rule, and it is too late to repudiate the stipulation after it has been executed. — *Id.*

See **APPEAL; ATTACHMENT; COSTS; EVIDENCE; EXECUTION; FINDINGS; JUDGMENT; NEW TRIAL; PARTITION; PLACE OF TRIAL; PLEADING; SUMMONS.**

PRINCIPAL AND AGENT. See **AGENCY.**

PROBATE LAW. See **ESTATES OF DECEASED PERSONS.**

PROHIBITION. See PARTITION.

PUBLIC LANDS.

1. **PRESCRIPTION — ADVERSE USER OF WATER — PUBLIC LANDS — GRANT FROM GOVERNMENT.** — There can be no adverse possession of land, or adverse user of water to the natural flow of which such land is entitled, so long as the title to the land remains in the United States; but a prescriptive right to the use of water may be acquired after the legal title of such land has vested in a grantee of the government. — *Jensen v. Smith*, 154.
2. **GRANT TO CENTRAL PACIFIC RAILROAD COMPANY — VESTING OF TITLE** — The grant of land to the Central Pacific Railroad Company, by the acts of Congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant *in present*, passing the legal title to the lands granted as of the date of the grant, as soon as the sections were identified by a legal survey and the definite location of the road. — *Id.*
3. **PATENT FOR RAILROAD LAND — DIVERSION OF WATER — STATUTE OF LIMITATIONS.** — As the legal title to land granted to the Central Pacific Railroad Company vested in the company upon identification of the land, and not at the date of the patent issued by the United States, the statute of limitations commenced to run in favor of one who diverted the waters of a stream upon the land after such identification and prior to the date of the patent, from the date of the diversion, as against the railroad company and its grantees. — *Id.*
4. **EFFECT OF GRANT — ADVERSE POSSESSION — SUBSEQUENT PATENT.** — When the legal title to land is granted by act of Congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department under authority of law, and such land then becomes subject to the limitation laws of the state in which it is situated, and an adverse possession thereof, after the date of such grant for the requisite period fixed by such laws, will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor in pursuance of such act of Congress. — *Id.*
5. **RECITALS IN PATENT — SURVEY AND IDENTIFICATION OF LAND GRANTED — PAYMENT OF COSTS AND FEES.** — The recitals in the patent from the United States to the Central Pacific Railroad Company, showing that the line of the railroad was definitely located, and that the company afterward filed with the register and receiver at Sacramento a selection of the land under the acts of Congress, and that such selection was properly certified to or approved by such register and receiver, are sufficient proof of the fact that the land was at the date of its selection surveyed by authority of the United States, and identified as land to which the grant made to the company had then attached, and that the costs of such survey and other fees required by law had been paid by such company. — *Id.*
6. **PATENT — EJECTMENT — EVIDENCE — OFFER OF PROOF — PUBLICATION OF NOTICE OF SURVEY AFTER PATENT — OBJECTIONS TO SURVEY.** — An offer by the plaintiff, in an action of ejectment to recover land within the former pueblo of Los Angeles, to prove that there was no publication of

PUBLIC LANDS (Continued).

notice of the survey and plat upon which was based the patent to the city of Los Angeles, under which the defendant claims, prior to the issuance of the patent, and that the United States surveyor-general published notice of the prior survey after the patent was issued, and that the city made objections to the survey, which were overruled, it being admitted that the city authorities did not then know of the issuance of the patent, and that they afterward demanded its delivery, is properly rejected. Such evidence does not show a non-acceptance of the patent by the city, or that it did not pass the legal title, although a subsequent patent for the same land was issued and delivered to the city. — *Alvarado v. Nordhoff*, 116.

- 7. EFFECT OF PATENT — RECORD — VESTING OF TITLE — PRESUMPTION OF ACCEPTANCE.** — When a United States patent is signed, sealed, and recorded in the records of the land-office, the title to the land therein described is transferred to the grantee, as far as the government is concerned, and its acceptance by the grantee will be conclusively presumed, unless, immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land-office. — *Id.*

See **WATER AND WATER RIGHTS**, 4.

PUBLIC OFFICERS. See **COUNTY GOVERNMENT ACT**; **HARBOR COMMISSIONERS**.

PUBLIC POLICY. See **CONSIDERATION**, 3.

PUEBLO. See **PUBLIC LANDS**, 6, 7.

QUANTUM MERUIT. See **CONTRACT**, 1, 6-8.

RAILROAD LANDS. See **PUBLIC LANDS**.

RECEIVER.

POSSESSION OF RECEIVER — CONVEYANCE BY MORTGAGERS UPON BREACH OF CONDITION. — A conveyance by a railroad company of a portion of its property to parties with whom it had contracted to convey such portion upon the breach of a condition cannot disturb the possession of a receiver appointed by the court, in an action against the company for the foreclosure of a mortgage, or embarrass him in the discharge of his duties. — *Klauber v. San Diego Street-car Co.*, 358.

See **CONTRACT**, 2; **PARTITION**.

RECLAMATION DISTRICT.

- 1. ACTION TO RECOVER ASSESSMENT — VALIDITY OF DE FACTO ORGANIZATION — ACTS OF OFFICERS LEVYING ASSESSMENT.** — In an action to recover an assessment levied upon land by a *de facto* reclamation district, the defendant cannot collaterally question the validity of the organization of the district, or of the acts of the board of trustees and commissioners in using data in the nature of evidence furnished by surveys, estimates, and reports considered by them as to the assessment of lands

RECLAMATION DISTRICT (Continued).

in the district, not invalidating their acts, otherwise legal, in levying the assessment sued upon. — *Reclamation District No. 124 v. Gray*, 601.

2. LEGISLATIVE VALIDATION OF DISTRICT — PROOF OF CORPORATE EXISTENCE — VALIDITY OF ASSESSMENT. — An act of the legislature purporting to legalize and validate a reclamation district is conclusive proof, in an action to recover an assessment upon lands in the district, of the existence of the corporation from the time of the passage of the act, and an assessment levied thereafter in accordance with the statute having reference to the organization of the district is valid and enforceable. — *Id.*

3. PUBLIC CORPORATION — CREATION BY SPECIAL ACT OR LEGISLATIVE RECOGNITION. — A reclamation district is a public corporation, which can be created not only by the means and in the manner provided by the general law, but also by special act or implication. Legislative recognition is in many cases sufficient proof of its existence. — *Id.*

RECORDING. See **CONTRACT**, 6-8; **DEEDS**, 7.

RES ADJUDICATA. See **DEEDS**, 17.

ROADS. See **STREETS, ROADS, AND HIGHWAYS**.

ROBBERY. See **CRIMINAL LAW**, 17.

STATE HARBOR COMMISSIONERS. See **HARBOR COMMISSIONERS**.

STATUTES.

STATUTORY CONSTRUCTION — SPECIAL STATUTE — EXCEPTION FROM GENERAL LAW — EFFECT OF REPEAL. — A special provision of the legislature, applicable to a certain city only, excepts the city from the effect of a general law upon the same subject, to the same extent as though it were a part of the general law, and when the provision creating the exception is repealed, the operation of the general law is extended to that extent. — *Santa Barbara v. Eldred*, 878.

See **HOME FOR CARE OF INEBRIATES**.

STATUTE OF FRAUDS.

1. SALE OF PERSONAL PROPERTY OWNED IN CO-TENANCY — CHANGE OF POSSESSION. — Although the statute of frauds is not applicable to a sale by a joint owner or co-tenant of personal property of his interest to a third party, where his co-owner has exclusive possession, yet where one of the co-owners of personal property, who is in the sole possession thereof, sells his interest therein to a third party, there must be an immediate delivery, followed by an actual and continued change of possession, as required by section 3440 of the Civil Code, or the sale will be void as to his creditors. — *Brown v. O'Neal*, 262.

2. FRAUDULENT TRANSFERS — ATTACHMENT BY SUBSEQUENT CREDITOR — CONSIDERATION — GOOD FAITH. — A transfer of personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is fraudulent and void as against the claim of any creditor who is such creditor during any of the time the

STATUTE OF FRAUDS (Continued).

person making the transfer remains in possession, and such creditor may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor. The consideration paid by the purchaser or the good faith of the transaction cannot be inquired into for the purpose of evading the force and effect of the law declaring such transfer fraudulent and void. — *Id.*

3. **EXECUTED AGREEMENT.** — The statute of frauds has no application to an executed agreement. — *Bates v. Babcock*, 479.

See INSTRUCTIONS; PARTNERSHIP, 1-6.

STATUTE OF LIMITATIONS.

1. **CAUSE OF ACTION BARRED IN ANOTHER STATE — PLEADING — CONSTRUCTION OF CODE.** — It is not necessary for a defendant who claims that the cause of action is barred by limitation, under section 861 of the Code of Civil Procedure, to set out the facts upon which he relies to show that the cause of action arose in another state, and that under the laws of that state it would be barred by the statute of limitations, but it is sufficient if he states generally that the cause of action is barred by that section. The rule of pleading established by section 458 of the Code of Civil Procedure applies to section 861 of that code. — *Allen v. Allen*, 184.
2. **DEED AS SECURITY FOR LOAN — CONTRACTS MADE OUT OF STATE — CONSTRUCTION — CONFLICT OF LAWS.** — In the construction of a deed to land in this state, executed out of the state, as security for the repayment of money advanced, the laws of this state existing at the time the deed was executed must be read as a part thereof, and must govern the right to foreclose and to redeem, although the contract of loan is to be construed according to the laws of the state where it was made. — *Id.*
3. **REMEDIES UNDER LAWS OF NEW YORK — ACTION TO REDEEM — LAW OF CALIFORNIA — DEED PASSING TITLE.** — Where such deed and contract of security were executed in the state of New York, between residents of that state, either party could have maintained an action in that state on the contract, the one to enforce the right to redeem, and the other to recover the amount for which the land was held as security; and when the action in that state to recover the debt became barred by the laws of that state, no action to redeem from the security could thereafter be maintained in this state, where it appears that, by the law in force in this state at the time of the execution of the deed, the legal title passed to the grantee by the deed, and the right to redeem was barred whenever the debt to secure which the deed was made became barred by the statute of limitations. — *Id.*
4. **RIGHT OF REDEMPTION — LAW OF CALIFORNIA IN FORCE AT DATE OF DEED — SUBSEQUENT CHANGE OF LAW.** — The right of the grantee of the deed of land in this state, intended as security, to redeem therefrom, and the time within which redemption might be made, were fixed by the laws of this state in force at the time of the execution of the deed; and no subsequent legislation could change the rights or obligations of the parties, or extend the time for action, section 846 of the Code of Civil Procedure having been enacted after the execution of the deed, and the

STATUTE OF LIMITATIONS (Continued).

decisions based on that section do not apply in determining the effect of the deed — *Id.*

5. LAWS OF NEW YORK IMMATERIAL — INTEREST IN LAND — *LES LOCS REI SITÆ*. — It is immaterial whether by the laws of the state of New York, where the deed of land in this state was executed, an action to redeem the land under the contract for security could be maintained in that state, although an action for the recovery of the money due was barred, since the interest of each party in the land is governed by the *les loci rei sitæ* in force at the time of the execution of the deed, and the right to redeem is governed by the laws of this state then in force. — *Id.*
6. TWO-YEARS CLAUSE — TORTS — CONSTRUCTION OF CODE. — Section 339 of the Code of Civil Procedure, providing that an action upon a contract, obligation, or liability, not founded upon an instrument in writing, must be brought within two years after the cause of action shall have accrued, is applicable to all actions at law not specifically mentioned in other portions of the statute, and includes liabilities arising in consequence of torts committed, as well as those arising from contracts, express or implied, not founded upon an instrument in writing. — *Lettis v. Gillette*, 317.
7. RUNNING OF STATUTE — BREACH OF CONTRACT — DISREGARD OF DUTY. — The statute of limitations begins to run against an action for misconduct or negligence from the date when the misconduct or negligence was completed, and it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty. — *Id.*
8. RIGHT OF ACTION — FUTURE DAMAGES — KNOWLEDGE OF NEGLIGENCE. — The right to maintain an action for negligence is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged. — *Id.*
9. LIABILITY OF SEARCHER OF RECORDS — LIMITATION OF ACTION FOR NEGLIGENCE — LOSS OF TITLE WITHIN TWO YEARS. — One who holds himself out as an examiner of titles is bound to exercise skill and care in making the examination, and is liable in damages for a failure to exercise such skill and care; but an action against a searcher of records, for damages resulting from his negligence in the examination and report upon the condition of the title to realty, must be commenced within two years after the giving of the report, or it is barred by the statute of limitations, although the plaintiff was deprived of a portion of the land by means of a suit brought within two years before the commencement of the action for damages. — *Id.*
10. FOUR-YEARS CLAUSE OF LIMITATION — CERTIFICATE OF TITLE — CONSTRUCTION OF CODE. — Section 337 of the Code of Civil Procedure, prescribing the limitation of four years for an action upon a contract, obligation, or liability, founded upon an instrument in writing, refers to contracts, obligations, or liabilities arising from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities, and does not apply to a certificate of title given by a searcher of records employed to examine and make a written report of the condition of the title, where

STATUTE OF LIMITATIONS (Continued).

damages are claimed for negligence of the searcher in giving an incorrect certificate. — *Id.*

See ADVERSE POSSESSION; CORPORATIONS, 25.

STIPULATION. See PRACTICE, 16-21.**STOCK AND STOCKHOLDERS. See CORPORATIONS.****STREET ASSESSMENT. See APPEAL, 6.****STREETS, ROADS, AND HIGHWAYS.**

1. **TOLL-ROAD — EXPIRATION OF FRANCHISE — PUBLIC HIGHWAY.** — A franchise for a toll-road granted by the legislature for the period of twenty years expires by limitation at the end of the twenty years, and the road then becomes a public highway. — *Blood v. Woods*, 78.
2. **POSSESSION OF TOLL-ROAD — COLLECTION OF TOLLS — PRESUMPTION.** — A person in the possession of a road claimed by him to be a toll-road, authorized by the legislature to be continued for twenty years, who has collected tolls thereon for over twenty years since the passage of the act, and who shows no other franchise therefor, will be presumed to have claimed the right to tolls under the original grant, and to have collected them lawfully during the existence of the franchise, although there is no direct evidence that the persons named in the act, or their assigns, constructed the road, or that he was an assignee of such persons, or collected tolls under that franchise. — *Id.*
3. **DEDICATION OF PUBLIC ROAD — CONDITION AS TO TOLLS.** — The act of constructing and opening a toll-road for use, followed by public user thereof, constitutes a dedication of it as a public road. The fact that tolls are demanded, and that the public uses the road only upon condition of paying tolls, does not affect the question of dedication. — *Id.*
4. **AUTHORITY OF SUPERVISORS — FREE PUBLIC ROAD — TOLLS — FRANCHISE.** — The board of supervisors of a county has no authority to grant a franchise to collect tolls upon a free public road. — *Id.*
5. **LEGISLATIVE ACT — EXCESS OF AUTHORITY — LIMITS OF PROCEDURE.** — The granting of a franchise for a toll-road by the board of supervisors of a county is a legislative act, and the board, in granting it, cannot exceed the authority vested in them, or transcend the limits of the procedure required of them. — *Id.*
6. **JUDICIAL INQUIRY AS TO CHARACTER OF ROAD — COLLATERAL ATTACK UPON AUTHORITY OF SUPERVISORS.** — The granting, by the board of supervisors of a county, of a franchise to collect tolls, does not preclude inquiry by the courts as to whether the road was a toll-road or a free public highway, and their conclusion upon that fact may be questioned collaterally. — *Id.*
7. **RECORD OF PUBLIC ROAD — DEDICATION.** — It is not necessary that the board of supervisors of a county should cause a road to be recorded as such, to render a strip of land dedicated to the public as a public road a legal public highway. — *Id.*
8. **PUBLIC HIGHWAY — PETITION TO SUPERVISORS — WIDTH OF ROAD — CONSTRUCTION OF POLITICAL CODE — VALIDITY OF PROCEEDINGS.** — Sec-

STREETS, ROADS, AND HIGHWAYS (Continued).

tion 2682 of the Political Code, providing what the petition to the board of supervisors for the laying out of a public highway must contain, does not require it to state the width of the road, and the failure to state it does not render the proceedings void, notwithstanding section 2681 of the same code requires the road to be at least forty feet wide, and authorizes the viewers to report upon the necessity of a greater or practicability of a less width of road than petitioned for. A petition for a road not stating the width must be construed to be a petition for a road at least forty feet wide. — *Hill v. Board of Supervisors of Ventura County*, 289.

9. APPROVAL OF BOND. — Where the bond required by section 2683 of the Political Code to accompany the petition is presented with it, though the petition is marked filed a few days before the date of the bond, an order of the board of supervisors, that the bond be filed, and that the petition be acted upon by the appointment of viewers, is sufficient evidence of an approval of the bond by the board — *Id.*
10. JUSTIFICATION OF SURETIES — RIGHTS OF PROPERTY OWNERS. — The fact that the bond was approved, although the sureties had not justified as required by law, is a mere irregularity, which could not affect the private rights of a property owner. The validity of the proceedings cannot be made to depend upon the correctness of the judgment of the board as to whether the justification of a surety was in accordance with the statute. — *Id.*
11. CONDEMNATION OF LAND — SUBSTANTIAL COMPLIANCE WITH STATUTE — RECORDS OF SUPERVISORS — INDULGENCE OF COURTS. — The laying out of a public highway is a proceeding to condemn land, and the mode is in some sense the measure of the power, and it must appear that the statute has been substantially complied with, to render the proceedings valid; yet the courts make very liberal indulgences in favor of the records of the board of supervisors in such proceedings, which, though of great importance, are usually imperfect. — *Id.*
12. MUNICIPAL CORPORATIONS — WIDENING OF STREET — ORDINANCE NOT COMPLYING WITH STATUTE — INSUFFICIENT SPECIFICATION OF BOUNDARIES — ASSESSMENT — INJUNCTION. — The ordinance adopted by the city of Los Angeles July 8, 1889, for the widening of First Street from the west side of Los Angeles Street to the west line of Alameda Street, which provides that the exterior boundaries of the district of land to be benefited are "all lots and parcels of land fronting on each side of First Street, from the west side of Los Angeles Street to the west side of Alameda Street," does not comply with the provisions of section 2 of the act of March 6, 1889 (Stats. 1889, p. 70), under which the proceedings for the widening were had, which declares that the city council shall pass a resolution "specifying the exterior boundaries" of the district of lands to be affected or benefited thereby; and a sale of lands for the purpose of satisfying an assessment under such ordinance will be restrained by injunction. — *Dehail v. Morford*, 457.
13. JURISDICTIONAL REQUIREMENTS ESSENTIAL. — In proceedings for the widening of a street, every requirement of the statute which may in any manner benefit the owner must be observed in order to give jurisdiction to the municipality. After the jurisdiction is once acquired, subsequent proceedings can be attacked for only such irregularities as

STREETS, ROADS, AND HIGHWAYS (Continued).

affect substantial rights; but for the purpose of acquiring jurisdiction, every requirement must be regarded as of equal necessity. — *Id.*

14. **FILING OF OBJECTIONS TO IMPROVEMENT—RIGHT TO OBJECT TO JURISDICTION—WAIVER.** — The fact that a property owner, whose land had been assessed for the widening of a street, appeared before the city council and filed objections to the improvement, and afterwards protested against the report of the commissioners, did not operate as a waiver of his right to object to want of jurisdiction in the council over the subject-matter of the improvement. — *Id.*

15. **DEDICATION OF STREET—GRANT UPON CONDITIONS—PUBLIC USER—FURNITURE—NEGLECT TO GRADE STREET.** — Land granted to a city by a corporation, in pursuance of a resolution of the directors of the corporation granting it for a public road and highway, on the condition that a fence thereon be removed and reset on the line of the road at the expense of the city, and that the street be graded at the city's expense, becomes a public street, subject to the conditions named, upon its acceptance and user by the city; and the city does not forfeit its right to use it as a public street simply because it does not grade it when required to do so by the corporation, but it must be apparent that the city will not grade it at its expense, or at all, before the corporation can reclaim the land.—*Los Angeles Cemetery Association v. City of Los Angeles*, 420.

See **CONSIDERATION; DEDICATION.**

SUMMONS.

SERVICE OF SUMMONS — MANAGING AGENT — CLERK OF FOREIGN CORPORATION — CASHIER — CONSTRUCTION OF CODE. — A person employed by a foreign mining corporation as a clerk in a store belonging to it is not the managing agent or cashier of the corporation upon whom summons may be served, within the meaning of section 542 of the Code of Civil Procedure, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in a mine belonging to the corporation from data furnished him by the superintendent, and to pay them. The word "cashier" in such section refers to an executive officer of a corporation, — as the cashier of a bank, — and not to a simple employee who is not a managing agent. — *Blanco v. Paymaster Mining Co.*, 524.

See **PRACTICE**, 15.

SUPREME COURT.

1. **CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT—POWER OF COURT IN BANK—MODIFICATION OF JUDGMENT RENDERED IN DEPARTMENT—REHEARING IN BANK.** — Under the constitution of this state, there is but one supreme court, and the jurisdiction which is vested in it may be exercised either in Bank or in Department. The court in Bank has the power to correct an error in, or modify the judgment rendered in, a Department, at any time within thirty days, of its own motion, irrespective of any application therefor, and it is not necessary that the cause be argued in Bank upon an order therefor, to give the court in Bank jurisdiction thereof. — *Niles v. Edwards*, 41.

SUPREME COURT (Continued).

2. **FAILURE OF CLERK TO ENTER ORDER MODIFYING JUDGMENT.**—An order of the supreme court modifying a judgment is not rendered nugatory by reason of the failure of the clerk to enter it in his minutes until after the expiration of thirty days from the time when the judgment was pronounced in Department. The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk. — *Id.*

SURETIES. See CORPORATION, 22-25.

SWAMP AND OVERFLOWED LANDS. See RECLAMATION DISTRICT.

TAXATION.

1. **ACTION FOR TAXES — ISSUE AS TO LEGALITY — TRANSFER FROM POLICE COURT TO SUPREME COURT — CONSTRUCTION OF CODE.**—In an action brought in a police court to recover taxes, where the answer raises an issue as to the legality of the tax sought to be recovered, it is the duty of the court to transfer the action to the superior court for trial, under the provisions of section 838 of the Code of Civil Procedure, which applies to police courts as well as to justices' courts. — *City of Santa Barbara v. Eldred*, 378.

2. **VOID JUDGMENT OF POLICE COURT — APPELLATE JURISDICTION.**—Where the verified answer in such action discloses facts which require a transfer of the cause to the superior court, from the time of the filing of the answer the police court is ousted of its jurisdiction to proceed further upon the merits presented by the pleadings, and a judgment rendered therein is void, and the superior court has no appellate jurisdiction to try the case. — *Id.*

3. **ORIGINAL JURISDICTION OF SUPREME COURT — TRIAL OF APPEAL UPON MERITS — WAIVER OF IRREGULARITY.**—The superior court has original jurisdiction in matters involving the legality of a tax, and over an action to recover a tax, the legality of which is put in issue; and where the parties proceed to trial upon the merits in such an action appealed from the police court to the superior court, over which the superior court has no appellate jurisdiction, its original jurisdiction is not affected by the irregular way in which it acquired the jurisdiction over the parties, the consent of the parties to the trial upon the merits being a waiver of the irregularity of procedure. — *Id.*

4. **MUNICIPAL TAXATION — POWER OF CITY COUNCIL — CHARTER OF SANTA BARBARA — OPERATION OF POLITICAL CODE.**—The act of the legislature of March 10, 1874, under which the city of Santa Barbara was incorporated, providing for the levy of an annual tax, not exceeding one per cent, for the payment of bonds and interest and the current expenses of the city, one third to be devoted to the payment of the interest upon and establish a sinking fund for the payment of the bonds, did not repeal section 4371 of the Political Code, providing that the direct taxes imposed by a common council in any one year must not exceed two per cent of the valuation of property within the city, but merely suspended

TAXATION (Continued).

its operation as to the city of Santa Barbara; and the act of March 15, 1876, amending the act of March 10, 1874, so as to provide that for the payment of the bonds and interest thereon an annual tax should be levied, not exceeding one fourth of one per cent, repealed the portions of the act of March 10, 1874, referring to the levy of taxes for current expenses of the city, and leaves section 4871 of the Political Code as the only limitation on the power of the common council in fixing the rate of the levy of the tax to pay the current expenses of the city; and a levy by the council, at the rate of \$1.50, upon each one hundred dollars of taxable property, is not in excess of its power. — *Id.*

See DEDICATION, 3, 4.

TENANTS IN COMMON. See ADVERSE POSSESSION: STATUTE OF FRAUDS, 1.

TITLE. See ARBITRATION, 1.

TOLL-ROAD. See STREETS, ROADS, AND HIGHWAYS, 1-7.

TORTS. See STATUTE OF LIMITATIONS, 6-10.

TRUST.

1. **DEED OF TRUST — RESCISSION — REVOCATION OF WILL.** — A complaint in an action brought to have it decreed that a conveyance of lands by the plaintiff to the defendant created a mere naked legal trust, and to compel the defendant to convey the lands to the plaintiff, alleging that the property was conveyed in trust, and that at the same time the defendant executed a written instrument, which, after reciting that the property was conveyed in trust, contains an acceptance of the trust and an agreement to carry out the same according to a declaration of trust set forth in plaintiff's will, executed contemporaneously therewith, and which further alleges that the deed was executed solely for the purpose of securing the defendant for small amounts of money to be loaned to the plaintiff by the defendant, and as a part of his last will, and further avers that the plaintiff has revoked his will and the naked trust, if any, created by the conveyance, and has offered to repay the sums advanced by defendant, but which avers neither undue influence, fraud, or any other of the ordinary grounds for avoiding conveyances, states no cause of action. — *Kopp v. Gunther*, 63.
2. **VOLUNTARY TRUST NOT REVOCABLE — WANT OF CONSIDERATION.** — A voluntary deed of trust passing a present interest in fee to the trustee, with full power to control, encumber, and sell the property without reserving a power of revocation, is irrevocable, and a want of consideration therefor is immaterial. — *Id.*
3. **DECLARATION OF TRUST IN WILL — REVOCATION OF WILL — SEPARATE DEED OF TRUST — REFERENCE TO WILL.** — A declaration of trust in a will as to property conveyed to a trustee by an absolute conveyance in trust, which is no part of the will, is not revoked by the revocation of the will, where the property conveyed is expressly excepted from the estate disposed of by the will, and the declaration of trust contained in

TRUST (Continued).

the will is referred to in the deed of trust for the purpose of showing the nature of the trust. — *Id.*

4. MISTAKE OF LAW — TESTAMENTARY DISPOSITION — RELIEF IN EQUITY.

— A mere mistake of law on the part of the grantor of a deed of trust as to the nature and effect of the instrument, supposing it to be a mere testamentary disposition of his property, remaining within his control, is not ground for relief in equity, especially where it appears that he intended to put the property beyond the reach of an unfavorable judgment. — *Id.*

5. TRUST DEED — DECLARATION OF TRUST — POWER TO SELL AND CONVEY.

— An instrument which conveys to a grantee named therein the legal title to property described, upon certain trusts which it declares, and which confers upon him the power in execution thereof to sell the property thus conveyed and transmit the legal title to his grantee, is a trust deed. — *More v. Oalkins*, 485.

6. DEED TO CREDITOR TO BE PAID FROM PROCEEDS OF SALE — MORTGAGE.

— The fact that such deed was made directly to a creditor of the grantor as trustee, and not to a third party, is immaterial upon the question as to whether the conveyance should be treated as a mortgage or a deed of trust, as such question must depend upon the essential character of the instrument as shown by its terms, and not upon whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared. — *Id.*

7. DEATH OF GRANTOR — REVOCATION OF POWER OF SALE — FAILURE TO PRESENT CLAIM — CANCELLATION OF DEED.

— The death of the grantor does not operate as a revocation of a power of sale contained in a trust deed, or limit the effect of the deed; and the failure to present to the administrator of the deceased grantor the claim secured by it furnishes no ground for a court of equity to cancel the deed. — *Id.*

8. CONSTRUCTION OF DEED — CONSIDERATION OF PROMISE TO TRUSTEE — APPEAL — LAW OF CASE.

— The construction placed upon a deed of trust by the supreme court, in its decision reversing the judgment and remanding the case for a new trial, holding that a promise to pay ten thousand dollars to the trustee, besides his debts and the reasonable expenses of his administration, was without consideration, is the law of the case, and the question of its correctness will not be considered upon a second appeal. — *Id.*

9. COMPENSATION OF TRUSTEE — REIMBURSEMENT OF EXPENSES.

— A trustee, upon the close of his trust, is entitled to a reasonable compensation for his services in performing his duties under the trust deed, to be fixed by the court, unless the parties can agree in relation thereto, and is entitled to be reimbursed for all expenses incurred by him. — *Id.*

5. ASSIGNMENT IN TRUST — TRUSTEE AS BENEFICIARY — ASSIGNOR'S ATTORNEY — TRUST FOR FEES AND DISBURSEMENTS.

— Where the owner of a note, upon which a suit is brought against the makers, assigns it in trust, together with all the avails of the action, and certain other claims to secure certain specified obligations, "first deducting and paying out of any money that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment is also made," the fact that the assignee is one of the beneficiaries named does not prevent the assignment from creating a trust,

TRUST (Continued).

which may be enforced in favor of the attorney of the assignor, for his fees and disbursements for costs in the suit on which the note was made. — *Tyler v. Mayre*, 160.

6. ENFORCEMENT OF TRUST AGAINST ADMINISTRATOR OF TRUSTEE. — Such trust devolves upon the administrator of the trustee, and may be enforced directly against him by the assignor's attorney, as an equitable cause of action. — *Id.*

7. PROMISE FOR BENEFIT OF ANOTHER — EXECUTED CONSIDERATION — AGREEMENT BY ASSIGNEE TO PAY ATTORNEY'S FEES OF ASSIGNOR. — The agreement by the assignee to pay the fees of the assignor's attorney, being based upon an executed consideration, may be enforced by the attorney, as a promise made for his benefit, by an action at law against the assignee. — *Id.*

8. ESTATES OF DECEDENTS — PRESENTATION OF CLAIMS — PLEADING. — The cause of action in favor of the attorney of the assignor, against the administrator of the assignee, is not governed by section 1498 of the Code of Civil Procedure; and if the administrator pleads the statute of limitation, the cause of action against him is not affected by a finding that the cause of action against the deceased assignor was barred by that section, however it might affect the estate of the assignor. — *Id.*

9. DISQUALIFICATION OF PLAINTIFF AS WITNESS — CLAIM AGAINST ESTATE. — The plaintiff in such action cannot testify against the administratrix of the deceased assignor to an agreement made between the assignor, the assignee, and the plaintiff, to the effect that the plaintiff should continue to prosecute the suit upon the assigned note as attorney for the assignor, and be paid a reasonable fee out of the proceeds of the judgment, if collected, nor can he testify to any matters of fact occurring before the death of the assignor. — *Id.*

See DEEDS, 11; ESTATES OF DECEASED PERSONS, 2, 3; PARTNERSHIP, 3.

UNDERTAKING. See APPEAL, 9, 10; ATTACHMENT; CORPORATIONS, 22; MORTGAGE, 2.

UNDUE INFLUENCE. See DEEDS, 11; ESTATES OF DECEASED PERSONS, 4-10.

VENDOR AND VENDEE.

1. ACTION TO RECOVER PURCHASE-MONEY PAID — TIME OF ESSENCE — PLEADING — INSUFFICIENT COMPLAINT — WANT OF PERFORMANCE BY PLAINTIFF. — A complaint by a purchaser to recover money paid upon a contract for the purchase of land, which alleges that by the terms of the contract the sum sued for was to be paid down, and the remainder of the purchase-money was to be paid in installments, and that upon the payment of the last installment the vendor was to execute a deed of the land: that time was made the essence of the contract by express terms; and that at the maturity of the contract the vendors failed and refused to execute a deed; but which does not allege a payment of any deferred installments, or a tender of performance, or an excuse for a failure to make the tender, or any rescission of the contract, — does not state a cause of action. — *Townsend v. Tufts*, 257.

VENDOR AND VENDEE (Continued).

2. **MUTUAL NEGLIGENCE TO PERFORM — RESCISSION — FIRST BREACH BY PURCHASER — TENDER AND DEMAND OF CONVEYANCE.** — The mere neglect of both parties to such contract to perform the contract on the day fixed for its performance could not, without anything more, operate as a rescission thereof; and when the complaint shows a first breach of the contract on the part of the purchaser, by failure to pay the first deferred payment a full year before the vendors were required to convey, a full tender on his part of the remainder of the purchase-money due, and a demand for a deed, is essential to a recovery of the purchase-money paid, and it is not enough to allege a refusal of the vendors to make and tender a deed at the date fixed for conveyance. — *Id.*
3. **RESCISSION OF CONTRACT OF SALE — RECOVERY OF PURCHASE-MONEY PAID — RECOURPMENTS OF DAMAGE.** — When a contract of sale and purchase of lands is abandoned or rescinded by the parties the vendee, though in default, may recover back installments of the purchase-money paid, less the actual damage to the vendor, occasioned by his breach of the contract. — *Phelps v. Brown*, 572.
4. **RECOVERY FROM AGENTS OF VENDEE — ESTOPPEL OF AGENT.** — Where a firm of real estate agents, who negotiated a sale and purchase of land, received from the vendee for the vendor a check for a sum of money as a deposit or first payment upon the land, and took a receipt therefor from the vendor, as the agents of the vendee, and upon an abandonment and rescission of the contract by the parties, received back the amount of the check from the vendor, delivering back and canceling their receipt therefor as agents of the vendee, they are estopped from denying an agency for the vendee, and the vendee is entitled to recover back from such agents the amount so received by them. — *Id.*
5. **RESCISSION OF CONTRACT — RECOVERY OF PURCHASE-MONEY PAID — PLEADING — EXCUSE FOR TENDER AND DEMAND — WITHDRAWAL OF ESCROW BY VENDOR.** — A complaint, in an action to recover purchase-money paid under a contract for the purchase of land, need not allege a tender of the residue of the purchase-money, and a demand for a deed, if it shows a sufficient excuse for the omission, and where such complaint alleges that by the terms of the contract the deed to the land was placed in escrow, to be held until the final payments should be made, and that the vendor withdrew the deed from the holder thereof, and denied the right of the plaintiff to purchase under the contract, with intent to rescind the contract, it sufficiently shows that a tender of the balance of the purchase-money and a demand for the deed would have been of no avail, and entitles the plaintiff to the relief sought, as against a general demurrer. — *Merrill v. Merrill*, 334.

See BONA FIDE PURCHASER; DEEDS.

VENUE. See PLACE OF TRIAL.

WARD. See GUARDIAN AND WARD.

WATER AND WATER RIGHTS.

1. **EMINENT DOMAIN — CONDEMNING USE OF WATER — MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — GENERAL LAWS.** — Section 1001 of the

WATER AND WATER RIGHTS (Continued).

Civil Code and section 1238 of the Code of Civil Procedure providing for the acquisition of private property by "any person, without further legislative action," through the exercise of the right of eminent domain, for the use of "canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town," are general laws within the meaning of section 6 of article XI. of the constitution, providing that cities shall be subject to and controlled by general laws, and are applicable to municipal corporations formed before, as well as to those formed after, the adoption of the constitution of 1879. — *City of Santa Cruz v. Bright*, 106.

2. **NECESSITY — DISTANCE OF SUPPLY — NEARER WATERS OWNED BY WATER COMPANY — INSTRUCTIONS.** — Where the evidence shows that the waters of a creek from which a water company receives its supply are insufficient in quantity to supply the wants of the inhabitants of a city to which the company furnishes the water, during the summer months, and a portion of them are also inferior in quality, and that the population of the city is steadily increasing, and that the waters of the stream sought to be condemned by the city are excellent in quality, and abundant in quantity, and of sufficient elevation, the fact that the stream sought to be taken is further from the city than the streams from which the water company take their supply, although a matter to be considered, is not controlling upon the question of necessity, and where the instructions of the court as to the power to condemn, and the necessity claimed to exist, are correct, it is not error to refuse instructions predicated controllingly upon the question of distance, and upon the power of the city to condemn the waters owned by the water company. — *Id.*
3. **WATER RIGHTS — PRIVATE LANDS — RIPARIAN OWNERSHIP — APPROPRIATION.** — A riparian proprietor of private lands cannot acquire any right in the waters of the stream by mere appropriation. — *Id.*
4. **PUBLIC LANDS — PRESUMPTION — BURDEN OF PROOF.** — Where it does not appear whether the lands through which a stream ran at the time when a riparian proprietor claims to have acquired a right by appropriation were private or public property, it will not be presumed that they were public lands, but the burden of proving that they were such lands devolves upon the claimant. — *Id.*
5. **EVIDENCE — PRESCRIPTIVE RIGHT — NOTICE CLAIMING WATER — ERROR WITHOUT PREJUDICE — PRESUMPTION UPON APPEAL.** — Where the evidence showed without conflict that the defendant had acquired a prescriptive right to the use of the waters of the creek sought to be condemned, and the jury were fully and fairly instructed in reference thereto, it must be assumed, upon appeal, that the jury allowed the value of the prescriptive right, and the action of the trial court in excluding a notice which had been posted up in a conspicuous place by the defendant's grantor at the place where the water was diverted, and which tended to show that the defendant claimed the right to divert the water adversely to all other claimants, although erroneous, is not prejudicial. — *Id.*

WATER AND WATER RIGHTS (Continued).

6. EVIDENCE — EFFECT OF IRRIGATION — QUALIFICATION OF EXPERT. —

In a proceeding to condemn land, it is proper for the court to exclude the testimony of a witness as to his opinion, as an expert, as to the effect of irrigation upon the lands owned by the defendant, where it appears that the experience of the witness had been confined to another county, and he had never been upon the land in question, except for a period of one day in the winter, and it was not shown that the conditions, as to the climate, soil, topography, and rainfall, were the same in the county where the land was situated as they were in the county where the witness resided. — *Id.*

7. EMINENT DOMAIN — CONDEMNATION OF WATER RIGHTS — PLEADING —

PUBLIC USE — SUPPLY OF "FARMING NEIGHBORHOOD." — A complaint in an action by a water company to condemn water rights and a strip of land, which alleges that it is necessary to condemn and take the water rights, in order to carry out the purpose of the water company to supply a "farming neighborhood," composed of land riparian to the creek, with water for domestic use and irrigation, but which does not otherwise show whether the "farming neighborhood" is inhabited, not only fails to show that the use for which condemnation is sought is a public use, but shows affirmatively that it is not. — *Also Water Co. v. Baker*, 268.

8. "NEIGHBORHOOD" — CONSTRUCTION OF PLEADING. — The term "neighborhood" is an indefinite phrase, and may consist of but two houses upon a single farm; and as the pleading must be construed most strongly against the pleader, it must be understood that the farming neighborhood to be benefited consists of one farm only, and this the property of the plaintiff. — *Id.*

9. UNCERTAIN DESCRIPTION OF RIGHTS TO BE CONDEMNED — SPECIAL DEMURRER. —

A complaint in an action to condemn water rights, which describes them generally as all the rights of each of the defendants, whether as riparian owners or acquired by appropriation, adverse use, or prescription, except for domestic use and reasonable irrigation of their riparian lands, is uncertain in not showing definitely what water rights are proposed to be condemned, and is insufficient as against a special demurrer. — *Id.*

10. WATER RIGHTS — PERCOLATING WATERS — APPROPRIATION OF SPRING. —

DIVERSION. — Where a spring is fed solely by percolating waters which seep into it from swamp or wet land surrounding the same, and not by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user, and no action will lie in favor of one who has collected the water at the spring in a reservoir, and transmitted it by a pipe for use, against one who has diverted the water from the reservoir by means of a tunnel and ditch, constructed above the reservoir on his own land, for irrigation and domestic use. — *Southern Pacific Railroad Co. v. Dufour*, 615.

11. SUBTERRANEAN WATERS PART OF SOIL. — The law controlling the rights

to subterranean waters not running through a channel or defined course is very different from that affecting the rights of surface streams. In the former case the water belongs to the soil, is part of it, is owned and possessed as the earth is, and may be used, removed, and controlled to

WATER AND WATER RIGHTS (Continued).

the same extent by the owner; and no action will lie for injuries caused by cutting it off. — *Id.*

12. ACTION FOR DIVERSION — FINDING AS TO PERCOLATION — FAILURE TO FIND AS TO APPROPRIATION. — A finding, in an action for the diversion of water from plaintiff's reservoir, that the reservoir was sustained by percolating waters alone, and that the digging of the ditch by the defendant was for useful purposes upon his own land, and above the reservoir, is sufficient to sustain the judgment in favor of the defendant, and a failure to find upon the issue of appropriation does not constitute a reversible error. — *Id.*

13. WATER RIGHT — CONSTANT FLOW — CONSTRUCTION OF JUDGMENT. — A judgment in an action to determine and define a water right, adjudging that the defendants are the owners of a quantity of the waters in question "equal to a constant flow of two and one third inches, measured under a four-inch pressure, on their said premises, and are entitled to the use of the pipes, ditches, aqueducts, and reservoirs belonging to plaintiff," for the purpose of storing, preserving, and conducting the same upon their lands, does not entitle the defendants to put into the pipe an appliance by means of which they can at one time accumulate a head of water greater than a constant flow of two and one third inches under a four-inch pressure, and average the flow so as to equal the amount of such constant flow, but requires them not to obstruct the flow to any greater extent at any time than the constant flow provided for by the judgment. — *Alhambra Addition Water Co. v. Richardson*, 490.

14. RIGHTS ACQUIRED BY STIPULATION — FINDING. — If by the terms of a stipulation, entered into after the commencement of the former action, the defendants acquired any rights in the waters flowing their lands in the pipes of the plaintiff, other or different from those specified in the judgment, they are entitled to be protected therein in a subsequent action involving the water right; but it is necessary that the court in such subsequent action should find whether the stipulation was made before or after the commencement of the former action, and what were its terms. — *Id.*

15. WATER RIGHTS — PRESCRIPTION — CONSENT TO USE FROM WASTE-GATE OF CANAL — NOTICE OF ADVERSE RIGHT — NONSUIT. — In an action to enjoin the closing of a waste-gate to defendant's canal, brought by a plaintiff who alleges a prescriptive right to open the waste-gate and divert water from the canal, when not used to run defendant's mill, a nonsuit is properly granted, where plaintiff's evidence shows that the waste-gate was habitually opened by defendant's express or implied consent, in response to an inquiry of plaintiff as to whether they desired to use the water, and does not disclose an uninterrupted adverse user of the water for a period of five years to the knowledge of defendant and his grantors, and with notice to them of a claim of right to open the waste-gate and take the water from the canal without their consent. — *Ball v. Kehl*, 606.

16. BURDEN OF PROOF AS TO PRESCRIPTIVE RIGHT. — The burden of proving uninterrupted user with knowledge of the owner is on the party claiming a prescriptive right. — *Id.*

17. INTERRUPTION OF USER. — An interruption of adverse user, however slight, prevents the acquisition of title by prescription. — *Id.*

WATER AND WATER RIGHTS (Continued).

18. PERMISSIVE USE OF WATER. — The use of water by permission of the owner is not adverse. — *Id.*

19. APPROPRIATION OF WATER FROM WASTE-GATE — SECOND APPROPRIATION OF STREAM. — An appropriation of so much water as the owner of a canal may elect to discharge from his waste-gate does not include the right to take water from the canal through the waste-gate by a trespass without the owner's consent; and such appropriation does not confer the same right as that of a second appropriation of the waters of a natural stream subject to the rights of a prior appropriator. — *Id.*

See JUDGMENT, 2-5; PLEADING, 6; PUBLIC LANDS, 1, 2.

WHARFINGER. See HARBOR COMMISSIONERS.

WILLS. See ESTATES OF DECEASED PERSONS, 4-11; TRUST, 1, 2.

WITNESSES. See EVIDENCE.

